Ad perpetuam rei memoriam IV.

ELTE Law School's memorials for the Monroe E. Price Media Law Moot Court Competition

Editors:
Gergely Gosztonyi
Anna Zanathy

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In 2008 University of Oxford established the Monroe E. Price Media Law Moot Court Competition with the aims to foster and cultivate interest in freedom of expression issues and the role of the media and information technologies in societies around the world. The competition challenges students to engage in comparative research of legal standards at the national, regional and international levels, and to develop their arguments (in written and oral forms) on cutting-edge questions in media and ICT law[1].

ELTE Law School joined the competition in 2015 at the South-East European Regional Round[2]. Since that time ELTE Law School participated every year and its results are getting better and better[3].

With the publication of the written Memorials after each competition, ELTE Law School would like to appreciate the dedicated work of its students and help the future mooters to learn from their efforts.

We hope that our students will actually reach the stars and that we will find their names and scientific achievements in similar publications in the future as well.

Budapest, 2021.

The Editors

1 https://www.law.ox.ac.uk/centres-institutes/bonavero-institute-human-rights/monroe-e-price-media-law-moot-court-competition
2 https://www.law.ox.ac.uk/content/south-east-europe-2019-2020
3 https://majt.elte.hu/mootcourt

Memorial for Applicants

2019/2020

MÁRTON, ANGYAL – JANKA, BÁLINT – GERGELY, GOSZTONYI – DORINA, GYETVÁN – MIRTILL, HEVESI-TÓTH – OLIVÉR, NÉMETH

EÖTVÖS LORÁND UNIVERSITY FACULTY OF LAW // ELTE LAW SCHOOL

302A

THE 2019-2020 MONROE E. PRICE

INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

A, B and X

(*Applicants*)

v.

Surya

(*Respondent*)

MEMORIAL FOR APPLICANTS

Word Count for Argument Section: 4,994

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II. LIST OF ABBREVIATIONS

ACHPR	**African Charter on Human and Peoples' Rights**
ACHR	**American Convention on Human Rights**
ACommHPR	**African Commission on Human and Peoples' Rights**
Appellate Court	**Appellate Court of Surya**
High Court	**Criminal High Court of Sun City**
CJEU	**Court of Justice of the European Union**
Clarifications	**Price Media Law Moot Court Competition 2019-20 Compiled Clarification Questions and Answers**
CoE	**Council of Europe**
Compromis	**The 2019/2020 Price Media Law Moot Court Competition Case**
Constitution	**Surya's Constitution**

ECHR	**European Convention on Human Rights**
ECtHR	**European Court of Human Rights**
EU	**European Union**
fAIth!	**An upload filter called 'first Artificially Intelligent test of hatred!'**
FoE	**Freedom of Expression**
FoR	**Freedom of Religion**
Honourable Court	**Chamber of the Universal Court of Human Rights, Universal Freedom of Expression Court**
IACtHR	**Inter-American Court of Human Rights**
ICCPR	**International Covenant on Civil and Political Rights**
MoA	**Margin of Appreciation**
PhoNo	**Mobile Phone Number**

No(s)	**Number(s)**
OSCE	**Organisation for Security and Co-operation in Europe**
PD	**Personal Data**
SCPA	**Surya's Criminal Procedure Act**
UDHR	**Universal Declaration of Human Rights**
UN	**United Nations**
UN Doc	**United Nations Document**
UNGA	**United Nations General Assembly**
UNHRC	**United Nations Human Rights Committee**
USD	**United States' Dollar**

III. LIST OF AUTHORITIES

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IV. STATEMENT OF RELEVANT FACTS

Surya

Surya is a country with a population of approximately 25 million people. 90% of the population are Suryan. The Suryan identity has both ethnic and religious connotations. The official religion of the country is the Suryan faith, which involves the worship of the Sun.[1]

Chandra is an island approximately 200 miles from the coast of Surya. The country has been plagued by grave ethno-religious conflicts for decades, as the Tarakans, a belief minority, have been waging a civil war for their independence against the Chandrean majority population. In the course of the conflict, many Tarakans left Chandra for Surya. By 2019, Surya had a sizable Tarakan population, among whom 10,000 were registered as asylum seekers.[2]

Hiya!

Hiya! is an online messaging application in Surya, which can be downloaded to mobile phones and other devices. Users can register using their mobile phone numbers. The application has two basic functions.[3]

First, a bilateral chat function enables users to chat with other users on a one-to-one basis. These chats are visible only to the two users in the conversation. A user can correspond with any other user who is on their contact list. To add someone to the contact list, the user must know the mobile phone number of the other user.[4]

[1] Compromis 1.

[2] Compromis 2.

[3] Compromis 3.

[4] Compromis 4.

Second, a broadcast function permits users to stream audio and video content. A broadcast is either a live stream or a pre-recorded content scheduled to be broadcast at a given time. If the broadcast is a live stream, the word 'live' appears, in case of pre-recorded streams, the words 'pre-recorded' are displayed on the video.[5]

Broadcasts can be viewed by any user who subscribes to the broadcast channel. Any user can subscribe to another user's broadcast channel by searching for, and clicking on the channel in the broadcast tab. The subscriber can listen to or view the material that any channel is broadcasting at the time. Many organisations use the broadcast function.[6]

Each broadcast channel has a unique link, which subscribers can share. Any user with the link to the channel can view the broadcast running on that channel.[7]

Broadcasters can use a ping function to alert their subscribers when a broadcast is about to begin or has begun. When this function is utilized, a 'star' appears over the broadcast tab on each subscriber's Hiya! interface. Broadcasters can also use the bilateral chat function to communicate with any or all of their subscribers.[8]

Subscribers can save and download a broadcast as a separate file. However, the option to save and download is only available for 30 seconds after the broadcast ends.[9]

Hiya! developed an upload filter called 'first Artificially Intelligent test of hatred!' (fAIth!), which automatically screens the broadcasts and blocks them – even live streams – if they contain content considered to be hate speech as per Hiya!'s 'Standards on Hate Speech'. In

[5] Compromis 5.

[6] Compromis 5, 6.

[7] Compromis 7.

[8] Compromis 8.

[9] Compromis 9.

January 2019, an independent university study found that, if properly trained, fAIth! could detect 87% of 'hate speech' content correctly. Additionally, any user can complain to Hiya! if they come across content that constitutes 'hates speech'.[10]

The situation of *andha*

Andha is the philosophy of the Tarakans. It considers sight to be the principal mean of temptation, thus the wearing of blindfolds is propagated as a way of 'turning a blind eye to temptation'. Tarakans, in fact, adopted the practice of wearing blindfolds in public to manifest and promote their beliefs. Consequently, by 2019, the proportion of ethnic Suryans adhering to *andha* has risen by over 10% compared to 2015.[11]

This issue triggered public debate. Several groups of Suryan patriots criticised *andha* for being 'insular' and for inducing Suryans to adopt it. One of such groups was SuryaFirst, which the Applicants are members of. It launched a series of broadcasts on the issue on its broadcast channel on Hiya! called Seeing is Believing, which had only 0.4% of Surya's population subscribed to. In January 2019, some of these groups launched a campaign demanding that the government introduce laws on blasphemy in relation to the Suryan faith and the Sun, and to prevent proselytism and the conversion of Suryans into *andha*. A link to an online petition with over 30,000 signatures was also being circulated over Hiya!. On 20 January 2019, the Suryan government announced that it was holding public consultations on the costs and benefits of regulating proselytism. On 15 February the government amended Surya's Penal Act to include Section 220, a new provision criminalizing forced conversion.[12]

[10] Compromis 9; Clarifications 37.

[11] Compromis 10, 11.

[12] Compromis 10, 12, 13, 14; Clarifications 41.

At 4pm on 16 February, SuryaFirst pinged its subscribers notifying them that a broadcast was about to begin. It also sent out the link to the broadcast channel informing the subscribers that a broadcast of the situation of Surya was about to begin. However, by 4.15pm only 0.14% of Surya's population tuned in.[13]

The broadcast began with a video message by a masked individual who identified himself as the Sun Prince. He made a short statement addressing the negative effects of Suryans converting into *andha* and criticised the temptation of *andha*. The message was followed by a live stream which showed a group of persons during an altercation with a blindfolded individual, and, after a couple of minutes, one of the persons taking down the blindfold without any resistance. The broadcast then returned to a pre-recorded stream of the Sun Prince, who concluded the video by briefly encouraging Suryans to resist the temptation of *andha.*[14]

The upload filter fAIth! did not identify the videos as 'hate speech', neither were they banned as a consequence of user complaints. The broadcast was downloaded and saved by only around 3,000 Hiya! users, approximately 0.012% of Surya's population. Until 17 February a mere 1% of Surya's population viewed the video. From 18-28 February, videos depicting persons accosting blindfolded individuals were shared on Hiya!, however, none on the SuryaFirst broadcast channel. On 28 February, a short, pre-recorded broadcast was launched on the SuryaFirst channel, in which the Sun Prince expressed his appreciation towards the Suryan community.[15]

[13] Compromis 15.

[14] Compromis 16, 17, 18; Clarifications 47.

[15] Compromis 19; Clarifications 37.

Complaints and investigations

On 1 March 2019, two separate complaints were filed. The first complaint was filed under Section 220 of the Penal Act by S, who claimed to be the blindfolded person from the broadcast of 16 February. He contended that the incident was an attempt to forcibly convert him from his belief. The second complaint was submitted by T under Section 300 of the Penal Act. She claimed to be a person of Tarakan origin with visual impairment. She asserted that she had experienced discrimination throughout her life, and alleged that since mid-February, she had experienced a demeaning environment towards visually impaired persons.[16]

The prosecutor's office decided to launch investigations into both complaints. It sent a letter to Hiya!'s Head Office requesting all personal data pertaining to the broadcasters of the SuryaFirst broadcast channel, and the user identifying himself as the Sun Prince. Hiya! responded 24 hours later with the mobile phone numbers of the two broadcasters associated with the SuryaFirst broadcast channel. Hiya! also immediately blocked the SuryaFirst broadcast channel.[17]

Thereafter the relevant mobile providers were directed to release the names to whom the mobile phone numbers belonged. Thus A and B were tracked down and taken into custody. During police interrogations, A and B revealed that X was the masked individual who described himself as the Sun Prince.[18]

Criminal proceedings

On 1 May 2019, the prosecutor's office indicted X under Section 220 of the Penal Act and A and B under Section 300 of the Act. The Criminal High Court of Sun City heard the cases. It

[16] Compromis 20, 21, 22, 23.

[17] Compromis 24; Clarifications 29.

[18] Compromis 25; Clarifications 60.

convicted all the Applicants. X was sentenced to 2 years imprisonment suspended for 2 years on the condition that no repeat offences are committed during such time. A and B were directed to pay a fine of USD 2,000 each.[19]

A, B and X appealed their convictions before the Appellate Court of Surya pursuant to the Criminal Procedure Act, which enables any person convicted of an offence to challenge the conviction before the Appellate Court, however, only on the basis that the conviction violated one of the rights guaranteed under the Suryan Constitution.[20]

A, B and X claimed that their convictions violated their rights to privacy and freedom of expression respectively guaranteed by Articles 8 and 10 of the Suryan Constitution. Regarding freedom of expression, X argued that his statement was not intended to forcibly convert any person and was merely an expression of opinion. According to him, the domestic law particularly protected the Suryan faith. Meanwhile, A and B asserted that they did not intend to advocate hatred against any particular group in their broadcasts, they only ran the broadcast channel to generate advertising revenue. Moreover, they stated that fAIth! had not blocked the broadcast as illicit content. As to the right to privacy, X contended that the collusion between the government and the service provider led to the discovery of his identity, which was protected under the Suryan Constitution. A and B, too, argued that the government had colluded with Hiya! to obtain personal data. They further maintained that there was no law in Surya requiring a service provider to provide personal data to the government without a judicial warrant.[21]

[19] Compromis 26.

[20] Compromis 27.

[21] Compromis 29, 30.

The Appellate Court, however, decided to uphold the convictions of A, B and X and confirmed the sentences issued by the High Court. Upon the convictions, Hiya! banned A, B and X from the application permanently, and terminated the SuryaFirst broadcast channel.[22]

[22] Compromis 33, 34.

V. STATEMENT OF JURISDICTION

A, B and X (Applicants) have applied to the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights, hearing issues relating to the violation of rights recognised in the Article 17 and Article 19 of the ICCPR.

A, B and X appealed the decisions of the Criminal High Court of Sun City to the Appellate Court of Surya, but it decided to uphold the convictions of A, B and X and confirmed the sentences issued by the High Court. A, B and X exhausted their domestic appeals.

This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

The Applicants request this Honourable Court to issue a judgment in accordance with relevant international law, including the UDHR, the ICCPR, Conventions, jurisprudence developed by relevant courts, and principles of international law.

VI. QUESTIONS PRESENTED

The questions presented, as certified by this Honourable Court, are as follows:

1. Whether Surya's decision to obtain personal data from Hiya! and from certain other users violated X's rights under Article 17 of the ICCPR.
2. Whether Surya's decision to obtain personal data regarding A and B from Hiya! violated their rights under Article 17 of the ICCPR.
3. Whether Surya's prosecution and conviction of X violated his rights under Article 19 of the ICCPR.
4. Whether Surya's prosecution and conviction of A and B violated their rights under Article 19 of the ICCPR.

VII. SUMMARY OF ARGUMENTS

Surya's decision to obtain personal data from Hiya! and from certain other users violated X's rights under Article 17 of the ICCPR

Surya's decision to obtain personal data from Hiya! and A and B did interfere with X's privacy. Personal data protection is vital to a person's enjoyment of private life and necessary to protect information which might reveal details about the online activity of an individual. This includes sensitive data, such as religious beliefs. Even though Hiya! only provided A and B's mobile phone numbers, it was enough for the prosecutor's office to identify X by interrogating A and B. Therefore, the two measures combined identified X as Sun Prince. Furthermore, X did not waive his expectation of privacy as such expectation does not depend on whether privacy shelters legal or illegal activity. Therefore, there was an interference with X's privacy. This interference was not justified for the following three reasons.

Firstly, the decision to obtain personal data from Hiya! and from A and B was not envisaged by law. The Suryan Criminal Procedura Act calls for a judicial warrant prior to obtaining such data from Hiya!, but Surya proceeded without one. Moreover, the interrogation was not sufficiently regulated by the Criminal Procedure Act because it only set out the general procedure for evidence gathering. Therefore, the regulations did not allow him to reasonably foresee the consequences of his conduct.

Secondly, Surya's decision did not pursue legitimate aim, as public interest to prosecute a potential perpetrator is not a permissible restriction.

Thirdly, the decision to obtain personal data from Hiya! and from A and B was not reasonable in the particular circumstances, because the identification was not necessary for Surya to fulfil its positive obligation of protecting the *andha* community. Disclosure is only necessary in cases of a serious crime, but X was only a suspect due to a speech act, thus there was no pressing social need. The decision was also disproportionate since there were other less intrusive means which would have been equally effective but would not have involved X's public humiliation even before substantiating the allegations against him.

Surya's decision to obtain personal data regarding A and B from Hiya! violated their rights under Article 17 of the ICCPR

Surya's decision to obtain all data relating to A and B from Hiya! led to the identification of A and B, thus the mobile phone numbers made them identifiable, which concerns privacy. Furthermore, A and B's reasonable expectation of privacy was trespassed, since the nature of the interest depends on whether people generally have a privacy interest in the information. Them being suspects of an alleged crime did not diminish that expectation. Therefore, there was an interference with A and B's privacy, which was not justified for the following three reasons.

Firstly, the interference was not envisaged by law, because the decision was not surrounded with adequate safeguards. Surya's decision was communicated in a formal letter, however, Surya's Criminal Procedure Act called for a judicial warrant. Consequently, Surya had unfettered discretion and A and B could not contest the decision of disclosure.

Secondly, Surya's decision did not pursue legitimate aims, as public interest to prosecute a potential perpetrator is not a permissible restriction.

Thirdly, the interference was not reasonable, as Surya did not only request the data strictly needed for the investigation but all data, which was clearly not necessary considering that there was no pressing social need to prosecute the broadcast channel operators. It would have been equally effective to contact and seek assistance from Hiya! to block the broadcast from its platform or suspend their accounts without interfering with their privacy. Correspondingly, the decision was disproportionate, since Surya not only violated their privacy but through violating their anonymity in the online sphere, it also caused a chilling effect on freedom of expression. Not to mention the fact that the 'urgent' situation cannot be invoked to support Surya's decision as the obtaining of a prior judicial warrant would not have hindered the investigation.

Surya's prosecution and conviction of X violated Article 19 of the ICCPR

Surya's prosecution and conviction of X violated his freedom of expression. Firstly, the prosecution was not prescribed by law, because Section 220 was only introduced by the amendment of 15 February, while X's message broadcasted on 16 February was pre-recorded, thus the new provision was not adequately accessible to him at the time of his speech. Neither did Section 220 provide adequate safeguards, as the use of vague terms such as 'divine displeasure', 'social excommunication' and 'otherwise' conferred unfettered discretion of Suryan authorities.

Secondly, the prosecution did not pursue a legitimate aim as the protection of the rights of a vulnerable group cannot extend to the imposition of criminal sanctions on the exercise of freedom of expression in order to exempt *andha* from all criticism.

Thirdly, the prosecution was not necessary in a democratic society for the following reasons. At the time of the broadcast, the situation of *andha* was an issue of public concern constantly discussed in public debates, under which circumstances there is very little scope for restrictions

of freedom of expression. Additionally, the impugned expressions were criticisms of *andha*, which its adherents must tolerate, even in the form of propagation of doctrines hostile to their faith. Moreover, as a religious communication, X's speech was highly metaphorical and symbolic, thus it should be construed as an expression of dissatisfaction and not as a call for violence. Taking all these factors into account, the prosecution and conviction of X cannot be regarded as answering to a pressing social need. Furthermore, the prosecution was disproportionate taking into account the 2-year prison sentence imposed on X which may create a chilling effect on freedom of expression.

Surya's prosecution and conviction of A and B violated Article 19 of the ICCPR

Surya's prosecution and conviction of A and B violated their freedom of expression. Firstly, the prosecution was not prescribed by law, because Section 300 does not define 'advocacy' in a sufficiently precise manner, which renders the provision unforeseeable.

Secondly, the prosecution did not pursue a legitimate aim as mere conjecture regarding possible disturbances is not sufficient to justify a restriction of freedom of expression.

Thirdly, the prosecution was not necessary in a democratic society for the following reasons. At the time of the broadcast, the situation of *andha* was an issue of public concern constantly discussed in public debates, under which circumstances there is very little scope for restrictions of freedom of expression. Additionally, the impugned broadcasts were criticisms of *andha*, which its adherents must tolerate, even in the form of propagation of doctrines hostile to their faith. Moreover, even though the actions depicted by the broadcast might have been offensive or disturbing, such expressions are still protected by freedom of expression. Furthermore, the content must not be assessed in isolation, but by taking into account the earlier videos broadcast on the channel, which were not offensive. Considering all these factors, the prosecution and

conviction of A and B cannot be regarded as answering to a pressing social need. What is more, the prosecution was disproportionate taking into account the combined USD 4,000 fine payable by A and B which may create a chilling effect on freedom of expression, making similar entities to self-censor and to err on the side of caution.

VIII. ARGUMENTS

ISSUE A: SURYA'S DECISION TO OBTAIN PERSONAL DATA FROM HIYA! AND CERTAIN OTHER USERS VIOLATED X'S RIGHTS UNDER ARTICLE 17 OF THE ICCPR

1. Privacy is enshrined under Art.17[23] and numerous human rights conventions.[24] 'Private life is a broad term not susceptible to exhaustive definition.'[25] It encompasses aspects connected to personal identity, including 'personal information which individuals can legitimately expect should not be published without their consent'.[26] This issue may arise 'outside a

[23] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[24] Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217A (III), art 12; European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), art 8; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978), art 11.

[25] *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992) [29]; *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [61]; *Peck v the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003) [57]; *Smirnova v Russia* App nos 46133/99 and 48183/99 (ECtHR, 24 October 2003) [95]; *S. and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [66]; *Shimovolos v Russia* App no 30194/09 (ECtHR, 21 June 2011) [64]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [83]; *Vukota-Bojić v Switzerland* App no 61838/10 (ECtHR, 18 October 2016) [52]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [100]; European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 1 November 2019 [135].

[26] *Flinkkilä and Others v Finland* App no 25576/04 (ECtHR, 6 April 2010) [75]; *Saaristo and Others v Finland* App no 184/06 (ECtHR, 12 October 2010) [61]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [83]; *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) [72]; European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 1 November 2019 [135].

person's home or private premises'.[27] Therefore, it should be examined whether the right to privacy under Ar.17 was affected by a specific conduct.[28]

2. Applicants will follow a two-stage test to assess the legality of Surya's decision to obtain PD from Hiya! and from certain other users: (A) whether such decision interfered with X's privacy under Art17; and if yes, (B) whether such interference was unlawful and arbitrary.[29]

(A) Surya's decision interfered with X's privacy

3. To establish whether Surya's decision interfered with X's privacy under Art.17, Applicant proceeds according to the test of the ECtHR in *Benedik v Slovenia*: (i) nature of the interest involved, (ii) whether the applicant was identified by the contested measure and (iii) whether the applicant had a reasonable expectation of privacy.[30]

[27] *P.G. and J.H. v the United Kingdom* App no 44787/98 (ECtHR, 25 September 2001) [57]; *Gillan and Quinton v The United Kingdom* App no 4158/05 (ECtHR, 12 January 2010) [61]; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016) [193]; European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 1 November 2019 [136].

[28] ICCPR Article 17; *P.G. and J.H. v the United Kingdom* App no 44787/98 (ECtHR, 25 September 2001) [57]; European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 1 November 2019 [136].

[29] UNHRC 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [4]; Ursula Kilkelly, *The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention of Human Rights* (Human Rights Handbook No 1, Council of Europe, 2003) 8-9.

[30] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [107]-[118].

(i) Nature of the interest

4. Privacy is commonly referred to as the right to live privately away from unwanted attention.[31] PD protection is vital to a person's enjoyment of private life.[32] Mere disclosure of one's PD is sufficient to trigger the protection of privacy regardless of the sensitivity of the information.[33]
5. X's identity was not publicly available and was only known to the prosecution after A and B's interrogations. The ECtHR established that issues concerning an individual's name fall within the scope of private life.[34] Therefore, the name of a masked individual must be treated as inextricably connected to relevant pre-existing content revealing data.[35]

(ii) Whether X was identified by the contested measure

6. Surya attempted to identify X twice: from Hiya! and then from A and B. The decision to obtain all PD from Hiya! did not identify Sun Prince in itself, as Hiya! only provided the

[31] *Bruggemann and Scheuten v Federal Republic of Germany* (1981) 3 EHRR 244 [55]; *Smirnova v Russia* App nos 46133/99 and 48183/99 (ECtHR, 24 October 2003) [95]; *Sidabras and Džiautas v Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004) [43]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [130]; Alcidia Moucheboeuf, *Minority rights jurisprudence digest* (Council of Europe, 2006) 366; Attila Fenyves, Ernst Karner, Helmut Koziol, Elisabeth Steni (ed), *Tort Law in the Jurisprudence of the European Court of Human Rights* (De Gruyter, 2011) 544.

[32] *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [137]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [103]; *M.L. and W.W. v Germany* App nos 60798/10 and 65599/10 (ECtHR, 28 June 2018) [87]; UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' UN Doc A/HRC/23/40 (17 April 2013) [22].

[33] *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) [48]; *Kopp v Switzerland* App no 23224/94 (ECtHR, 25 March 1998) [53]; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) [69]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [133].

[34] *Burghartz v Switzerland* App no 16213/90 (ECtHR, 22 February 1994) [24]; *Stjerna v Finland* App no 18131/91 (ECtHR, 25 November 1994) [37]; *Mentzen v Latvia* App no 71074/01 (ECtHR, 4 December 2004); *Golemanova v Bulgaria* App no 11369/04 (ECtHR, 17 February 2011) [37]; *Henry Kismoun v France* App no 32265/10 (ECtHR, 5 December 2013) [25].

[35] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [109].

PhoNos of A and B,[36] but not X's as he was not operating the channel, only appeared in the broadcast. (Regarding this decision, see Issue B.)[37]

7. Thus, Surya decided to obtain X's PD from A and B during interrogations.[38] It is unambiguous that the purpose of the contested measure was to connect Sun Prince's persona with a real identity.[39] A and B's statement allowed the police to directly identify Sun Prince as X.[40]

(iii) X had a reasonable expectation of privacy

8. All individuals enjoy a 'reasonable expectation of privacy.'[41] X's expectation to remain anonymous was legitimate for two reasons. Firstly, the core element of privacy is the right to remain anonymous, especially online.[42] Secondly, X was masked in the broadcast, by which he demonstrated his intention to keep his identity hidden.[43] None of the data publicly

[36] Compromis 24.

[37] Arguments 27.

[38] Compromis 25.

[39] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [113].

[40] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [113]; Compromis 25.

[41] *Halford v the United Kingdom* App no 20605/92 (ECtHR, 25 June 1997) [45]; *Katz v United States* 389 US 347, 360 (1967)

[42] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [98]; *R v Spencer* [2014] 2 SCR 212 [43]; UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' UN Doc A/HRC/29/32 (22 May 2015) [12], [16], [56]; *Right to Online Anonymity – Policy Brief* (1st edn, Article 19, 2015) <https://www.article19.org/resources/report-the-right-to-online-anonymity/> accessed 1 November 2019 10.

[43] Compromis 16.

disclosed by X revealed his real identity.[44] Thus, he did not waive his expectation of privacy.[45]

9. Furthermore, 'privacy interests do not depend on whether […] privacy shelters legal or illegal activity'.[46] Therefore, X as a suspect of an ongoing investigation still had a reasonable expectation of privacy.
10. Therefore, X's interest in having his identity hidden was legitimate and falls within the scope of 'private life'.

(B) The interference was unlawful and arbitrary

11. Although Art.17 does not explicitly stipulate restrictions, the test of 'unlawfulness' and 'arbitrariness' is also subject to a three-part inquiry, namely whether the interference: (i) was envisaged by law; (ii) pursued legitimate aims, and; (iii) was reasonable in the particular circumstances.[47]

[44] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [32].

[45] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [115]-[117].

[46] *R v Spencer* [2014] 2 SCR 212 [36]; *United States v Jones* 132 S Ct 945 (2012) [6]; *Riley v California* 134 S Ct 2473 (2014) [23].

[47] UNHRC 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3]-[4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [8.3]; *Antonius Cornelis Van Hulst v Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.3]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5]; *Freedom of Expression Unfiltered: How Blocking and Filtering Affect Free Speech – Policy Brief* (1st edn, Article 19, 2016) <https://www.article19.org/resources/freedom-of-expression-unfiltered-how-blocking-and-filtering-affect-free-speech/> accessed 1 November 2019 20.

(i) The decision was not envisaged by law

12. No interference can take place except in cases envisaged by law.[48] Accessibility means that the law is published, and it is sufficiently precise to enable individuals to regulate their conduct, with foresight of the consequences that an action may entail.[49] An accessible law that does not have foreseeable effects will not be adequate.[50] Even though the SCPA was published, it only set out the general procedure for evidence gathering,[51] it did not regulate with reasonable clarity the scope and manner of the exercise of the police's discretion during interrogations. Therefore, it does not provide individuals the minimum degree of protection to which they are entitled under the rule of law.[52] Consequently, the disclosure of X's PD during interrogations was not prescribed by law.
13. The decision was not surrounded by adequate safeguards: in absence of judicial authorization, the authorities had unfettered discretion to assess the expediency and scope of the request.[53] Besides, Applicant could not file an appeal against the breach of his privacy, could only do so as part of a criminal appellate proceeding.[54]

[48] UNHRC 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3].

[49] *Margareta and Roger Andersson v Sweden* App no 12963/87 (ECtHR, 25 February 1992) [75].

[50] UNHRC, 'The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights' UN Doc A/HRC/27/37 (30 June 2014) [29].

[51] Clarifications 3.

[52] *Piechowicz v Poland* App no 20071/07 (ECtHR, 17 April 2012) [212].

[53] *Margareta and Roger Andersson v Sweden* App no 12963/87 (ECtHR, 25 February 1992) [75]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) [30]; *Moiseyev v Russia* App no 62936/00 (ECtHR, 9 October 2008) [266]; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82]; *Heino v Finland* App no 56720/09 (ECtHR, 15 February 2011) [42]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [59].

[54] Compromis 27.

(ii) The interference did not pursue a legitimate aim

14. The list of permissible restrictions on fundamental rights is exhaustive:[55] to protect national security, public order, public health or morals, and to respect the rights and reputation of others.[56] Public interest to prosecute a potential perpetrator is not named, thus the decision to obtain X's PD did not pursue a legitimate aim.

(iii) The interference was not reasonable in the particular circumstances

15. The contested measure was arbitrary as it was not reasonable in the particular situation: it was not (a)necessary in the circumstances of the given case and (b)was not proportionate to the legitimate end sought.[57]

a) The interference was not necessary

16. It was not necessary to disclose X's identity to fulfil Surya's positive obligation to protect the *andha* minority.[58] Although States enjoy a certain MoA in implementing their

[55] Agnes Callamard 'Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence' (OHCHR Experts Papers, Geneva, 2-3 October 2008); Manfred Nowak, *U.N. Covenant on Civil and Political Rights* (2nd revised edition, N.P. Engel Publisher 2005) 468-480; Marc J Bossuyt, *Guide To The "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987) 375.

[56] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171., art 12(3), art 18(3), art 19(3), art 21, art 22(2).

[57] UNHRC 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3]-[4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [6.4], [8.3]; *Antonius Cornelis Van Hulst v Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.6]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5], [7.4].

[58] Compromis 10, 11.

obligations[59], where a particularly important facet of an individual's identity is at stake, the margin will be restricted.[60]

17. The ECtHR also clarified that 'necessary' does not mean 'useful', 'reasonable', or 'desirable' but implies the existence of a 'pressing social need' for the interference in question.[61] The disclosure is necessary when it is indispensable to prevent serious and imminent risk to public order or public security and after receiving the PD, an appropriate level of protection is ensured.[62] X was prosecuted publicly, therefore, his identity was not sufficiently shielded.[63]
18. Moreover, there were no direct connections between the complaints and X,[64] therefore, the disclosure of his identity was not necessary to protect the rights of others.[65] Additionally,

[59] *Mikulić v Croatia* App no 53176/99 (ECtHR, 7 February 2002) [58]; *Odievre v France* App no 42326/98 (ECtHR, 13 February 2003) [40].

[60] *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985) [24], [27]; *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [71]; *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) [90]; *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) [77]; *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017) [182]; European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 1 November 2019 [135] [7].

[61] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 1 November 2019 [19].

[62] *Practical guide on the use of personal data in the police sector* (Council of Europe, 15 February 2018) <https://rm.coe.int/t-pd-201-01-practical-guide-on-the-use-of-personal-data-in-the-police-/16807927d5> accessed 1 November 2019 13.

[63] Clarifications 64.

[64] Compromis 21-23.

[65] Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 124.

there were no complaints regarding X via the Complaints Portal.[66] The message was even fettered through fAIth!, which detects hate speech with an 87% success rate. [67]

b) The interference was not proportionate

19. The protection of the rights of others could have been achieved with less intrusive measures. X's identity was disclosed during police interrogations for a speech act. The ECtHR found the interference with privacy is not required even where more serious crimes are involved.[68] Furthermore, FoE is directly connected to privacy.[69] The UN underlined that 'privacy is often understood as an essential requirement for the realization of [...] FoE,'[70] as anonymity online can facilitate FoE and media-pluralism.[71] Fear of losing one's anonymity within the media could stunt and even altogether halt plurality of media and cause a chilling effect of FoE.[72]

[66] Compromis 37.

[67] Compromis 9, 18.

[68] *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [36]; *Wisse v France* App no 71611/01 (ECtHR, 20 December 2005) [34].

[69] UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' UN Doc A/HRC/29/32 (22 May 2015) [12], [16], [56]; Francesco Buffa *Freedom of expression in the internet society* (1st edn, Key Editore, 2016) 496.

[70] UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' UN Doc A/HRC/23/40 (17 April 2013) [24].

[71] UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' UN Doc A/HRC/17/27 (16 May 2011) [53].

[72] *Legal Review of the Austrian Federal Act for Diligence and Responsibility Online* (1st edn, Organization for Security and Co-operation in Europe, 2019) <https://www.osce.org/representative-on-freedom-of-media/421745> accessed 4 November 2019 29.

20. Disclosing X identity encompassed disclosing his religion,[73] which is considered sensitive data,[74] therefore, it cannot be considered proportionate.

21. The ECtHR acknowledged that bringing a claim against the actual author of the content is not always an efficient protection for victims.[75] Therefore, disclosing X's identity should have been envisaged as a last resort in curbing the dissemination of harmful content,[76] and less draconian measures should have been ordered.[77] As X's influence depended on the availability of the channel,[78] the blocking the SuryaFirst broadcast channel would have been equally efficient without interfering with his privacy.

ISSUE B: SURYA'S DECISION TO OBTAIN PERSONAL DATA FROM HIYA! DID VIOLATE A AND B'S RIGHTS UNDER ARTICLE 17 OF THE ICCPR

22. The examination of the legality of Surya's decision to obtain PD from Hiya! involves the two-stage test introduced earlier.[79]

[73] *Sinan Işık v Turkey* App No. 21924/05 (ECtHR,2 February 2010) [41]; *Folgerø and Others v Norway* App no 15472/02 (ECtHR, 29 June 2007) [98].

[74] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 art 9(1); Council of Europe, *Handbook on European data protection law* (European Union Agency for Fundamental Rights and Council of Europe 2018) 159.

[75] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [91].

[76] *Cengiz and Others v Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015) [44].

[77] *Ürper and Others v Turkey* App nos 14526/07, 14747/07, 15022/07, 15737/07, 36127/07, 47245/07, 50371/07 (ECtHR, 20 January 2010) [43]; 'Our range of enforcement options' *(Twitter)* <https://help.twitter.com/en/rules-and-policies/enforcement-options> accessed 4 November 2019.

[78] *Paul Chambers v DPP* [2012] EWHC 2157 (QB) [31]; R+I Creative, 'Influencers: How Trends and Creativity become Contagious' (2 November 2010) <https://vimeo.com/16430345> accessed 1 November 2019.

[79] Arguments 2.

(A) Surya's decision interfered with A and B's privacy

(i) Nature of the interest

23. The contested measures ultimately led to the identification of A and B, therefore examining the purpose and effects of the prosecution's decision to obtain PD from Hiya! is necessary.

24. The acquired PhoNos are PD, as 'information relating to an identified or identifiable individual'.[80] The concept of 'identifiable' applies to direct and indirect identification,[81] PhoNos fulfil the criteria: they identified A and B.

25. Furthermore, IP address is a 'unique number assigned to every device on network'[82], and it was accepted by the ECtHR that it is PD.[83] Therefore as PhoNos are more closely connected to devices, the PD regulations apply.[84]

26. It is not required that all information enabling the identification of the data subject be in the hands of one person.[85] The fact that additional data necessary to identify the user is held by

[80] *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) [65]; R*otaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) [43]; *Sidabras and Džiautas v Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004) [43]; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016) [192]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [133]; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [70]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [40], [46], [53], [102], [111]; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted January 1981, entered into force 10 January 1985) 1496 UNTS 66 art 2; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 art 4.1; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 art 2a).

[81] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [40], [53], [55]; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 art 4.1; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 art 2a).

[82] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [96].

[83] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [107].

[84] *Copland v the United Kingdom* App no 62617/00 (ECtHR, 3 April 2007) [41]-[44]; *Liberty and Others v the United Kingdom* App no 58243/00 (ECtHR, 1 July 2008) [56].

[85] Case C-582/14 *Patrick Breyer v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2016:779 para 43.

another provider does not exclude that such data constitutes PD. It only has to be used 'likely reasonably' to identify the subject.[86]

(ii) Whether A and B were identified by the contested measure

27. The purpose of Surya's decision undoubtedly was to identify the broadcast channel administrator(s) through the access of PD without a court order.[87] Moreover, as stated above,[88] Surya targeted all PD to directly identify the broadcasters. Even though Hiya! did not disclose A and B's names, the formal letter resulted in their identification.[89]

(iii) A and B had a reasonable expectation of privacy

28. There is an interference with privacy when one's reasonable expectation of privacy has been trespassed.[90] The latter depends on the nature of the information sought.[91]

29. There is a reasonable expectation of privacy over one's private PhoNo, as it reveals information closely concerning an individual's privacy.[92] Since the application can be used on any electronic device, the disclosure of PhoNo is not only linked to one's smartphone, but to their other devices as well.[93] Furthermore, it cannot be stated that A and B waived

[86] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 art 2a) [26]; Case C-582/14 *Patrick Breyer v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2016:779 para 42.

[87] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [113].

[88] Arguments 6.

[89] Compromis 24; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [112].

[90] *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [44]; *R v Spencer* [2014] 2 SCR 212 [17].

[91] *R v Spencer* [2014] 2 SCR 212 [18]; *Riley v California* 134 S Ct 2473 (2014) [23], [28].

[92] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [108].

[93] Compromis 3.

their expectation of privacy[94] regarding their PhoNos by voluntarily registering to Hiya!, as the PhoNos were not disclosed to the general public.[95]

30. Most importantly, privacy interest does not depend on the legality of the activity.[96] Rather, it depends on 'whether people generally have a privacy interest in the information'.[97] Thus, an alleged criminal may still have a reasonable expectation of privacy, therefore being a suspect does not diminish such expectancy.

31. Online anonymity cannot be absolute and can be restricted in connection with other rights or legitimate imperatives.[98] However, the manner in which the data is obtained is not indifferent.[99] 'It would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information […]',[100] which implies that A and B reasonably expected that their PD would not be revealed unless a judicial warrant was obtained. The fact that the SCPA allows government authorities to instruct data controllers only if a judicial warrant is obtained[101] strengthens this expectation.

[94] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [129].

[95] Clarifications 39.

[96] *R v Spencer* [2014] 2 SCR 212 [36]; *United States v Jones* 132 S Ct 945 (2012) [6]; *Riley v California* 134 S Ct 2473 (2014) [23].

[97] *R v Spencer* [2014] 2 SCR 212 [36].

[98] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [149], *Declaration on freedom of communication on the Internet* (Council of Europe/Organization for Security and Co-operation in Europe, 2003) <https://www.osce.org/fom/31507> accessed 5 November 2019, 3; *Right to Online Anonymity – Policy Brief* (1st edn, Article 19, 2015) <https://www.article19.org/resources/report-the-right-to-online-anonymity/> accessed 1 November 2019 10.

[99] *S. and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [103].

[100] *R v Spencer* [2014] 2 SCR 212 [62].

[101] Clarifications 7.

(B) The interference was unlawful and arbitrary

32. Applicants proceed according to the test introduced in Issue A above.[102]

(i) The interference was not envisaged by law

33. Interference with one's privacy is to be performed only foreseeably and providing adequate safeguards against unfettered discretion.[103] Surya decided to obtain PD from Hiya! to disclose A and B's identity in a formal letter to the legal team.[104] However, the SCPA prescribes prior judicial authorisation[105] in accordance with the case-law of the ECtHR.[106] Therefore, Applicants do not contest the fact, that there was a provision in place regulating data requests, however, Surya did not proceed accordingly, consequently, the interference was not foreseeable.[107]

[102] Arguments 11; International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171., art 12(3), art 18(3), art 21, art 22(2); UNHRC 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3]-[4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [8.3]; *Van Hulst v Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.6]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5]; UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' UN Doc A/HRC/23/40 (17 April 2013) [28], [29].

[103] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Claude Reyes and others v Chile* IACtHR Series C No 151 (16 September 2006) [89]; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [59]; *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015) [85]; UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 16.

[104] Compromis 24.

[105] Clarifications 7.

[106] *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [34]; *Dumitru Popescu v Romania* App no 71525/01 (ECtHR, 26 April 2007) [70]-[73]; *Iordachi and Others v Moldova*, No. 25198/02 (ECtHR, 10 February 2009) [40].

[107] Compromis 24, Clarifications 7.

34. As stated in Issue A[108] there were no adequate safeguards available.

(ii) The interference did not pursue a legitimate aim

35. As stated above,[109] the list of permissible restrictions on fundamental rights is exhaustive.[110] However, public interest is not one of them, thus there was no legitimate aim.

(iii) The interference was not reasonable in the particular circumstances

36. The interference was not reasonable, because it was not necessary and was disproportionate.[111]

a) The interference was not necessary

37. The right to respect for private life requires that 'derogations and limitations in relation to the protection of PD must apply only in so far as is strictly necessary.'[112]

[108] Arguments 13.

[109] Arguments 14.

[110] Agnes Callamard 'Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence' (OHCHR Experts Papers, Geneva, 2-3 October 2008); Manfred Nowak, *U.N. Covenant on Civil and Political Rights* (2nd revised edition, N.P. Engel Publisher 2005) 468-480; Marc J Bossuyt, *Guide To The "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987) 375.

[111] UNHRC 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3]-[4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [8.3]; *Van Hulst v Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.6]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5].

[112] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [42]; Case C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECLI:EU:C:2008:727 para 56; Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Harmut Eifert v Land Hessen* [2010] ECLI:EU:C:2010:662 para 77; Case C-473/12 *Institut professionel des agents immobiliers (IPI) v Geoffrey Englebert and Others* [2013] ECLI:EU:C:2013:715 para 39; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238 para 52; Case C-212/13 *František Ryneš v Úřad pro ochranu osobních údajů* [2014] ECLI:EU:C:2014:2428 para 28; Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650 para 92.

38. The disclosure is necessary when indispensable to prevent serious and imminent risk and an appropriate level of protection is ensured.[113] Surya's request affected all PD,[114] therefore it is not questionable that the prosecution's intention was not only directed at PhoNos but at every information that can identify an individual.[115] It has no relevance that Hiya! only sent the PhoNos, as it only controls those in connection with users.[116] 'The collection of PD […] should be limited to what is necessary and proportionate for the prevention of a real danger' or the prevention, investigation and prosecution of a specific criminal offence.[117]
39. The disclosure of such PD can only be considered a pressing social need when there is a serious crime.[118] Thus the disclosure of X's PD for a speech act cannot be considered necessary in a democratic society.

[113] *Practical guide on the use of personal data in the police sector* (Council of Europe, 15 February 2018) <https://rm.coe.int/t-pd-201-01-practical-guide-on-the-use-of-personal-data-in-the-police-/16807927d5> accessed 1 November 2019 13.

[114] Compromis 24; *Smirnov v Russia* App no 71362/01 (ECtHR, 7 June 2007) [47].

[115] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 art 4.

[116] Compromis 3; Clarifications 28.

[117] Council of Europe 'Recommendation No R (87) 15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector' (17 September 1987) Principle 2.2; *Practical guide on the use of personal data in the police sector* (Council of Europe, 15 February 2018) <https://rm.coe.int/t-pd-201-01-practical-guide-on-the-use-of-personal-data-in-the-police-/16807927d5> accessed 1 November 2019 3.

[118] *Practical guide on the use of personal data in the police sector* (Council of Europe, 15 February 2018) <https://rm.coe.int/t-pd-201-01-practical-guide-on-the-use-of-personal-data-in-the-police-/16807927d5> accessed 1 November 2019 9, 18; *Liberty and Others v the United Kingdom* App no 58243/00 (ECtHR, 1 July 2008) [65].

b) The interference was not proportionate

40. Surya's decision to obtain PD resulted not only in the interference with the Applicants' privacy[119] but also violated online anonymity which allows individuals to express themselves freely without fear of retribution which influences FoE.[120]

41. The ECtHR recognizes the possibility to request data without prior judicial authorization in cases of urgency.[121] However, an emergency procedure may leave the authorities' unfettered discretion[122] to determine which situations qualify as urgent. To avoid such abuse of power subsequent judicial review would be an effective remedy [123] which the present case lacked.[124] If an urgent ground exists, it is impossible to obtain judicial authorization.[125] However, the 'urgent' situation cannot be invoked, as the obtaining of a prior judicial warrant would not have hindered the investigation.[126] The broadcast was conveyed on 16 February, but the complaints were only filed 2 whole weeks later. In the 2 months between the complaints and prosecution, there would have been sufficient time to obtain a judicial

[119] *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [44]; *R v Spencer* [2014] 2 SCR 212 [17].

[120] Lord Neuberger 'What's in a Name?: Privacy and Anonymous Speech on the Internet Conference 5RB Keynote Speech' (30 September 2014) <https://www.supremecourt.uk/docs/speech-140930> accessed 2 November 2019 [24]; UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' UN Doc A/HRC/29/32 (22 May 2015) [47].

[121] *Heino v Finland* App no 56720/09 (ECtHR, 15 February 2011) [41]; *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [35].

[122] *The Rule of Law Checklist* (Venice Commission of the Council of Europe, 2016) <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed 5 November 2019 [65].

[123] *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria* App no 62540/00 (ECtHR, 28 June 2007) [82]; *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015) [266], *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [37].

[124] Compromis 82.

[125] Supreme Court Decision 2012Da105482 decided March 10 2016.

[126] *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [44].

warrant and proceed lawfully.[127] Moreover, it was not key to request data covertly as A and B were not aware of the ongoing investigation: there was no danger that they would abscond.[128]

42. Furthermore, the obtaining of a judicial warrant was clearly not impossible, as the prosecution did so to instruct the mobile phone service provider to disclose the names pertaining to PhoNos.[129] Surya's investigation of the broadcasters would have allowed for a duly founded judicial warrant to acquire information regarding the PhoNos behind the channel.

43. Moreover, there were other measures available which would have been less restrictive.[130] Surya could have contacted and sought assistance from Hiya! to block the broadcast and related users from its platform. Blocking the Applicants' broadcast channel or suspending their account would have been equally effective without violating their privacy. Instead, Surya immediately required all PD without any prior examination and without exploring other options.

ISSUE C: SURYA'S DECISION TO PROSECUTE AND CONVICT X VIOLATED HIS RIGHTS UNDER ARTICLE 19 OF THE ICCPR

44. FoE is essential to a healthy and vibrant society and is considered fundamental to an individual's moral and intellectual development. [131] However, it is generally accepted in

[127] *Prezhdarovi v Bulgaria* App no 8429/05 (ECtHR, 30 September 2014) [45].

[128] Compromis 24.

[129] Clarifications 60.

[130] Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 124.

[131] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) art 10; International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. art 19(2); ACHPR (adopted 27 June 1981, entered into force 21 October

democratic societies that the exercising of the said right carries with it duties and responsibilities to ensure that co-existing rights are not impugned.[132]

45. Surya's declaration[133] purports to modify the legal effect of Article 19, thus, it constitutes a reservation.[134] Furthermore, it is a widely formulated, general reservation,[135] which subordinates the international obligation to protect FoE against Suryan laws.[136] Therefore, this reservation is incompatible with the object and purpose of the ICCPR,[137] which is to

1986) (1982) 21 ILM 58 art 9(2); Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217A (III) art 19; ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13.

[132] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) art 10(2); International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. art 19(3); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13(2); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 10(2); *Shchetko v Belarus* UN Doc CCPR/C/87/D/1009/2001 (HRC, 8 August 2006) [7.3]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 [15]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (11 May 2016) UN Doc A/HRC/32/38 [7].

[133] Compromis 35.

[134] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 2(1)(d); *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988) [48]; UNHRC, 'General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [3]; Report of the International Law Commission A/66/10/Add 1, 74.

[135] UNHRC, 'General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [12]; UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [6].

[136] Catherine J Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No.24(52)' 46 International and Comparative Law Quarterly 390, 396.

[137] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(3); Mark E Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL 2009) 325; UNHRC, 'General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [6]; UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [6]; Dinah Shelton, 'State Practice on Reservations to Human Rights Treaties' (1983) 1 Canadian Human Rights Yearbook 205, 277.

create legally binding human rights standards for ratifying states.[138] Thus, the reservation is severable, and the ICCPR should be operative for Surya without its benefit.[139]

46. An interference with FoE may only be justified if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.[140] These three requirements have been applied by the UNHRC,[141] IACtHR,[142] ECtHR[143] and ACommHPR.[144]

[138] UNHRC, 'General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [7]

[139] UNHRC, 'General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [18]

[140] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) art 10(2); International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.art 19(3); UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' UN Doc A/HRC/23/40 (17 April 2013) [28], [29].

[141] *Womah Mukong v Cameroon* UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) [9.7]; *Sohn v Republic of Korea* UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) [10.4]; *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) [11.2]; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) [7.3]; UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' UN Doc A/HRC/17/27 (16 May 2011) [24]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 [15]; UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [33]-[35].

[142] *Francisco Martorell v Chile* IACtHR Informe No 11/96 (3 May 1996) [55]; *Herrera-Ulloa v Costa Rica* IACtHR Serie C No 107 (2 July 2004) [120]; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc 51 [68]; IACHR, 'Freedom of Expression and the Internet' (2013) OEA/SER L/II CIDH/RELE/IN F11/13 [55]

[143] *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [45]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) [24]; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 October 2014) [59]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [124].

[144] ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; *Interights v Mauritania* Comm no 242/2001 (ACommHPR, 2004) [78]-[79].

(i) The interference was not prescribed by law

47. A norm is prescribed by law[145] if it fulfils the criteria described above.[146]

48. X's prosecution and conviction for forced conversion under Section 220 were not foreseeable for the following reasons. Firstly, a law must be adequately accessible to the person concerned.[147] Criminal liability cannot be imposed retroactively, as it would be without legal basis.[148] X's broadcast was pre-recorded,[149] thus he could not have been familiar with the new legislation, as Section 220 only entered into force 15 February.[150] Secondly, Section 220 was not foreseeable: the exemptions and limitations[151] were not sufficiently precise in order to enable individuals to regulate their conduct accordingly.[152]

[145] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 March 1983) [85]-[90]; *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]-[68]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57], [59].

[146] Arguments 12.

[147] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 17; UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25].

[148] *Ricardo Canese v Paraguay* IACtHR Serie C No 111 (31 August 2004) [175]; *Sobhraj v Nepal* UN Doc CCPR/C/99/D/1870/2009 (HRC, 21 November 2008) [7.6].

[149] Compromis 17; Clarifications 47.

[150] Compromis 14.

[151] *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [29]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]; *Restricting Freedom of Expression: Standards and Principles, Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression* (Centre for Law and Democracy, 2010) <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> accessed 4 November 2019 7.

[152] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Hashman and Harrup v the United Kingdom* App no 25594/94 (ECtHR, 25 November 1999) [31]; *Kimmel v Argentina* IACtHR Serie C No 177 (2 May 2008) [66], [67]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [121].

49. The standard of precision depends on the content of the law, the field, and the number and status of persons under its scope.[153] Restrictions of a criminal nature must be formulated 'in an express, accurate, and restrictive manner',[154] narrowly defining wrongful offences.[155] However, criminalizing the attempt of forcible conversion broadens the scope, which cannot be seen as narrow construction.[156] Moreover, Section 220 should enable everyday individuals to determine from the mere wording the acts attracting criminal sanction.[157] As 'force' has been inclusively defined[158] it is not clear whether actions like merely recording a message with one's religious opinion would constitute 'force'.

50. Section 220 did not provide adequate safeguards for two reasons. Firstly, terms such as 'divine displeasure', 'social excommunication' and 'otherwise' leave too wide MoA and uncertainty.[159] These vague terms tend to make way for any religious discussion to be caught by the provision, which carries the risk of 'extendibility'.[160] Consequently, the High Court had an unfettered discretion to decide whether X's message constituted forced

[153] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 March 1983) [88]; *Chorherr v Austria* App no 13308/87 (ECtHR, 25 August 1993) [25]; *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [35]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [44].

[154] *Kimmel v Argentina* IACtHR Serie C No 177 (2 May 2008) [63].

[155] *Norín Catrimán et al v Chile* IACtHR Serie C No 279 (29 May 2014) [156].

[156] Compromis 14.

[157] *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]; *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [29].

[158] Compromis 14.

[159] *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) [52]; *Association Ekin v France* App no 39288/98 (ECtHR, 17 July 2001) [46]; *Gaweda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [39].

[160] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [38].

conversion. Secondly, the conviction could only be challenged on the basis that it violated a constitutional right.[161]

(ii) The interference did not pursue a legitimate aim

51. The ICCPR exhaustively lists the legitimate aims of restricting FoE.[162] Through his speech X also practised religious teaching, a right granted by Art.18.[163] The State's duty of neutrality and impartiality is incompatible with any power on its part to assess the legitimacy of the ways religious beliefs are expressed.[164] As religious groups must tolerate even the propagation of doctrines hostile to their faith,[165] the protection of rights of others is unfounded. FoE also constitutes the primary and basic element of the public order.[166] Therefore, Surya's interference did not pursue legitimate aims.

[161] Compromis 27.

[162] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171., art. 19(3).

[163] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171., art 18.

[164] *Manoussakis and Others v Greece* App no 18748/91 (ECtHR, 26 September 1996) [47]; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [78]; *Refah Partisi (the Welfare Party) and Others v Turkey* App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) [91]; *Eweida and Others v the United Kingdom* App nos 48420/10, 59842/10, 51671/10, 36516/10 (ECtHR, 15 January 2013) [81].

[165] *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 September 2005) [28]; *Aydın Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006) [27]; *Sekmadienis Ltd. v Lithuania* App no 69317/14 (ECtHR, 30 January 2018) [81]; *Ibragim Ibragimov and Others v Russia* App nos 1413/08, 28621/11 (ECtHR, 28 August 2018) [93]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [42].

[166] Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, 'The Inter-American Legal Framework Regarding the Right to Freedom of Expression' (2009) CIDH/RELE/INF 2/09 [81].

(iii) The interference was not necessary

52. X was convicted for the attempt of forced conversion.[167] The threat of 'divine displeasure' and 'social excommunication' amounted to 'force'.[168] Such a threat can only be produced through speech; therefore, X's remarks should be assessed in light of standards applying to hate speech. To demonstrate that the conviction was not necessary in a democratic society, arguments will be structured according to the six-part test provided by the Rabat Plan of Action.[169]

a) Context

53. The value placed on uninhibited expressions is particularly high in the circumstances of public debate,[170] thus there is little scope for restrictions on such speeches.[171] The situation of *andha* in Surya was a matter of public concern, since Tarakans manifested their beliefs

[167] Compromis 14, 21, 26, 31.

[168] Compromis 14, 31.

[169] UNHRC, 'Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred' (11 January 2013) UN Doc A/HRC/22/17/Add 4 [29] (Rabat Plan of Action).

[170] UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [34]; *Aduayom and Others v Togo* Communication nos 422/1990, 423/1990, 424/1990 UN Doc CCPR/C/51/D/422/1990, 423/1990, 424/1990 (HRC, 30 June 1994) [7.4.]; *Zeljko Bodrožić v Serbia and Montenegro* Communication no 1180/2003 UN Doc A/61/40 (HRC, 31 October 2005) [7.2.]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 144.

[171] *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992) [64]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [58]; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [61]; *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) [60]; *Ivcher-Bronstein v Peru* IACtHR Serie C No 74 (6 February 2001) [155]; *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003) [67]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [43]; *Kenneth Good v Botswana* Comm no 313/05 (ACommHPR, 2010) [198]; *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) [159]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [42]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 144.

publicly,[172] which caused the number of its Suryan followers to rise by 10%.[173] Before the broadcast, continuous public debate was held regarding these issues.[174] Consequently, Surya had only a narrow MoA in this sphere.[175]

54. X's speech was part of this religious debate,[176] which is encompassed by FoE.[177] It was aimed at the protection of Suryan faith and the criticism of *andha*.[178] Followers of *andha* choosing to exercise the freedom to manifest their religion must tolerate the denial of their religious beliefs and even the propagation of doctrines hostile to their faith.[179] Moreover, FoR does not include the protection of religious feelings.[180] Even if Surya deems the interference necessary, its duty is to ensure mutual tolerance between opposing groups, not removing the cause of tension[181] by criminalization.

[172] Compromis 10.

[173] Compromis 11.

[174] Compromis 10, 12.

[175] *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) [159]; *Narodni List d.d. v Croatia* App no 2782/12 (ECtHR, 8 November 2018) [60].

[176] Compromis 16.

[177] UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [11]; *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) [11.1].

[178] Compromis 16.

[179] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [47]; *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 September 2005) [28]; *Aydın Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006) [27]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [52].

[180] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyik [6]; UNHRC 'Report of the Special Rapporteur on freedom of religion of belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance' UN Doc A/HRC/2/3 (20 September 2006) [37]; UNHRC, 'Report of the Special Rapporteur on the freedom of religion or belief' A/HRC/31/18 (23 December 2015) [6].

[181] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [53]; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [107]; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [127]; *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015) [55].

b) Speaker

55. When assessing whether X's conviction violated his FoE, his status as a private citizen must be noted. By masking himself,[182] X remained anonymous, therefore his social standing cannot be considered.

c) Intent

56. X was convicted for an offence that presupposes intention.[183] When assessing X's intention on the basis of the words he used, it must be taken into account that a speech may conceal intentions different from the ones it seems to proclaim.[184] X merely criticised *andha* for its regressive and isolative nature and wished to encourage its Suryan victims to abandon it.[185] Additionally, the broadcast of 28 February[186] cannot be utilized to determine X's intention, as it was pre-recorded,[187] thus could have been produced without any knowledge of the consequences of the speech of 16 February.

[182] Compromis 16.

[183] Compromis 14, 31.

[184] *United Communist Party of Turkey and Others v Turkey* App no 19392/92 (ECtHR, 30 January 1998) [58]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [51].

[185] Compromis 29.

[186] Compromis 19.

[187] Compromis 29.

d) Content and form

57. X expressed his sentiments in a highly metaphorical and hyperbolic way, typical of religious speech.[188] This style is protected with the substance of the ideas and information expressed.[189] Moreover, a remark that may be perceived as offensive does not justify criminal conviction, it must be established that it calls for violence.[190] While such references may be aggressive or hostile in tone, symbolic acts can be understood as expression of dissatisfaction and protest rather than a call to violence.[191] It is unjustifiable to restrict speech referencing the 'wrath of the Sun' or 'seeing the light,' because these metaphors should be understood as a manifestation of the belief in the superiority of their worldview common in most religions.[192]

58. As neither Hiya!'s users nor fAIth! interpreted the message as hate speech,[193] it was not blocked.[194] The speech also contributed to a debate of public interest, the coexistence of religions, thus it was less likely to be interpreted as incitement.[195] In this case, the degree of

[188] *Eweida and Others v the United Kingdom* App nos 48420/10, 59842/10, 51671/10, 36516/10 (ECtHR, 15 January 2013) [45]; *R v Secretary of State for Education and Employment, ex p Williamson and Others* [2005] UKHL 15, [2005] 2 AC 246 [23].

[189] *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999) [49]; *Gül and Others v. Turkey* App no 4870/02 (ECtHR, 8 June 2010) [41]; *Uj v Hungary* App no 23954/10 (ECtHR, 19 July 2011) [20]; *Tuşalp v Turkey* App nos 32131/08, 41617/08 (ECtHR, 21 February 2012) [48]; *Grebneva and Alisimchik v Russia* App no 8918/05 (ECtHR, 22 November 2016); *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 28 August 2018) [68].

[190] *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008) [53], [57]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [240]; *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 28 August 2018) [69].

[191] *Christian Democratic People's Party v Moldova (no 2)* App no 25196/04 (ECtHR, 2 February 2010) [27]; *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 28 August 2018) [74].

[192] *Ibragim Ibragimov and Others v Russia* App nos 1413/08, 28621/11 (ECtHR, 28 August 2018) [116].

[193] Compromis 18, Clarifications 37.

[194] Compromis 18.

[195] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [33], [34]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [50]; *Coleman v Australia* UN Doc CCPR/C/87/D/1157/2003 (UNHRC, 10 August 2006) [7.3].

hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection.[196]

e) Extent

59. Hiya! did not allow the broadcasts to be disseminated without limits.[197] X's speech could not be disseminated rapidly and widely, because Hiya! can only be used by registered users,[198] therefore it circulated only within a restricted circle via messages.[199]

60. Content published on mainstream platforms has more extensive reach compared to the ones that have minimal followers.[200] Only 0.53% of the users subscribed to the SuryaFirst broadcast channel, which is merely 100,000 users.[201] X's message could only reach 35,000 people the day of the broadcast[202] and only 1% of the population the next day,[203] therefore the speed of dissemination was moderate. The proliferation was put to a halt after the conclusion of the broadcast, as the content was only downloadable for 30 seconds after it

196 *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) [125]; *Narodni List d.d. v Croatia* App no 2782/12 (ECtHR, 8 November 2018) [60].

197 Compromis 9, 18, 19; *Erdoğdu and İnce v Turkey* App nos 25067/94, 25068/94 (ECtHR, 8 July 1999) [54].

198 Compromis 3.

199 Compromis 9.

200 *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 28 August 2018) [79].

201 Compromis 3, 13.

202 Compromis 15.

203 Compromis 19.

ended.[204] Only subscribers who downloaded the video could send it via bilateral messages[205] to people on their contact lists.[206]

f) Likelihood

61. X's speech was broadcast at 4.15pm on 16 February,[207] but no crimes were committed immediately.[208] However, FoE does not permit States to criminalize the advocacy of violence except when it is directed to inciting imminent lawlessness and is likely to incite such action,[209] 'it is a question of proximity and degree.'[210] A danger created by a speech cannot be considered clear and present if there is an opportunity for discussion.[211] In the present case, there was time for discussions, thus the remedy should have been 'more speech, not enforced silence'.[212]

[204] Compromis 9.

[205] Compromis 9.

[206] Compromis 4.

[207] Compromis 15, 16.

[208] Compromis 18, 19.

[209] *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) concurring opinion of Judge Bonello; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) partly dissenting opinion of Judge Bonello; *Brandenburg v Ohio* 395 U.S. 444, 447 (1969).

[210] *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) concurring opinion of Judge Bonello; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) partly dissenting opinion of Judge Bonello; *Schenck v United States* 294 US 47, 52 (1919).

[211] *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) concurring opinion of Judge Bonello; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) partly dissenting opinion of Judge Bonello; *Whitney v California* Concurring opinion of Mr Justice Brandeis 247 US 357, 377 (1927).

[212] *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) concurring opinion of Judge Bonello; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) partly dissenting opinion of Judge Bonello; *Whitney v California* Concurring opinion of Mr Justice Brandeis 247 US 357, 377 (1927).

62. The only hostile act that occurred immediately following X's remarks was the altercation between the group and S.[213] However, this instance cannot be the consequence of the speech, as it had already commenced by 4.15pm.[214]

63. Considering the above factors, the interference did not respond to a pressing social need.

(iv) The interference was not proportionate

64. The High Court sentenced X to a suspended 2-year imprisonment,[215] when only 'the most severe and deeply felt form of opprobrium'[216] should be sanctioned under criminal law. Criminal sanctions should be seen as *ultima ratio* applied in strictly justifiable situations, 'when no other means are capable of achieving the desired protection.'[217] The imposition of a criminal sanction, irrespective of its severity, is enough to violate the proportionality principle.[218] The High Court violated this principle, as Section 220(4) sets out the possibility to impose only a fine,[219] but X was sentenced to suspended imprisonment.[220] The threat of

[213] Compromis 17, 21.

[214] Compromis 17.

[215] Compromis 26, 33.

[216] *R v Keegstra* [1990] 3 SCR 697, 697.

[217] *Amorim Giestas and Jesus Costa Bordalo v Portugal* App no 37840/10 (ECtHR, 3 April 2014) [36]; *Report on the Relationship Between Freedom of Expression and Freedom of Religion* (Venice Commission, 17-18 October 2008) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)026-e> accessed 4 November 2019 [55]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (18 January 2000) UN Doc E/CN 4/2000/63 [52]; Richard Carver, 'Freedom of Expression, Media Law and Defamation' (Media Legal Defence Initiative and International Press Institute, 2015) <https://www.mediadefence.org/resources/manual-european-defamation-law> accessed 4 November 2019 20.

[218] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [35].

[219] Compromis 14.

[220] Compromis 26.

imprisonment in itself had a chilling effect.[221] The conditionality of the sanction does not alter that conclusion.[222]

ISSUE D: SURYA'S DECISION TO PROSECUTE AND CONVICT A AND B VIOLATED THEIR RIGHTS UNDER ARTICLE 19 OF THE ICCPR

65. The interference shall be assessed pursuant to the test introduced earlier.[223]

(i) The interference was not prescribed by law

66. A norm is prescribed by law if it fulfils the criteria described above.[224]
67. Foreseeability not only requires that the impugned measure should have legal basis in domestic law [225] but also refers to the quality of the law in question,[226] which must be

[221] *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) [113], [114]; *Mahmudov and Agazade v Azerbaijan* App no 35877/04 (ECtHR, 18 December 2008) [49].

[222] *Mahmudov and Agazade v Azerbaijan* App no 35877/04 (ECtHR, 18 December 2008) [51]; *Mariapori v Finland* App no 37751/07 (ECtHR, 6 July 2010) [68].

[223] Arguments 46.

[224] Arguments 12.

[225] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [47]; *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [66]; *Tolstoy Miloslausky v the United Kingdom* App no 18139/91 (ECtHR, 13 July 1995) [37]; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [88]; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [83]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57].

[226] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [27]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [81]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57].

formulated with sufficient precision[227] to enable individuals to anticipate the consequences which a given action may entail and thus to regulate their conduct accordingly.[228]

68. A and B were convicted under Section 300 for advocating hatred by sending hyperlinks of the SuryaFirst channel and pinging their subscribers on Hiya!.[229] Section 300 is too vague. While the term 'advocacy' has been defined,[230] it is not clear whether actions like sending hyperlinks to one's broadcast channel and not the broadcasted content would constitute advocacy. A criminal act must be strictly interpreted,[231] so its application to hyperlinks to the broadcast channel was not reasonably foreseeable.

69. Furthermore, Section 300(3) defines the term 'advocacy' but does not include the act of notification by pinging.[232] A and B pinged subscribers that a live broadcast was about to begin,[233] which according to 300(3) does not constitute advocacy. Therefore, not even a 'divine legal counsel could have been sufficiently certain'[234] that pinging by analogy constitutes advocacy under Section 300(3).

[227] *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) [52]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 17; UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [24], [25].

[228] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Larissis and Others v Greece* App no 23372/94 (ECtHR, 24 February 1998) [40]; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [81]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57].

[229] Compromis 26, 31.

[230] Compromis 22.

[231] Simeneh Kiros Assefa, 'Methods And Manners of Interpretation of Criminal Norms' (2017) 11 Mizan Law Review 117.

[232] Compromis 22.

[233] Compromis 15.

[234] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) joint dissenting opinion of Judges Sajó and Tsotsoria [20].

70. Section 300 did not provide adequate safeguards, thus was not prescribed by law.[235]

(ii) The interference did not pursue a legitimate aim

71. FoE can only be restricted for the aims listed by the ICCPR.[236] A and B facilitated a democratic dialogue of public interest, a sphere in which restrictions on FoE are to be strictly construed.[237] FoE can only be restricted if 'the words used are used in such circumstances and are of such a nature as to create a clear and present danger',[238] therefore mere conjecture regarding possible disturbances is not sufficient to justify interference.[239] Similarly, where the rights and reputations of others are allegedly harmed, the existence of clear harm or threat of harm must be proven.[240]
72. The prosecution failed to establish a clear link between A and B promoting their channel and the alleged harm of others, therefore the interference did not pursue legitimate aims.

[235] Arguments 50.

[236] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171., art 19(3)

[237] *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992) [64]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [58]; *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) [60]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) [34]; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [61]; *Ivcher-Bronstein v Peru* IACtHR Serie C No 74 (6 February 2001) [155]; *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003); *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [43]; *Kenneth Good v Botswana* Comm no 313/05 (ACommHPR, 2010) [198]; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013) [102]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [197]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [42]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 144.

[238] *Schenck v United States* 294 US 47, 52 (1919)

[239] Office of the Special Rapporteur for Freedom of Expression with the Inter-American Commission on Human Rights, Inter-American Legal Framework Regarding the Right to Freedom of Expression, 2009, CIDH/RELE/INF. 2/09 [82].

[240] *Ricardo Canese v Paraguay* IACtHR Serie C No 111 (31 August 2004) [72]

(iii) The interference was not necessary

a) Context

73. As stated in Issue C,[241] the value of uninhibited expressions is particularly high in the circumstances of public debate,[242] thus there is little scope for restrictions.[243]

b) Speaker

74. A and B were ordinary members of the SuryaFirst group.[244] Their audience consisted of Hiya! users interested in the public debate going on, thus the likelihood of violence was less because they were presumably exposed to different ideas.[245]

c) Intent

75. A and B were convicted of advocacy of hatred for the maintenance of the SuryaFirst channel.[246] Advocacy of hatred requires intention on the part of the speaker.[247] However,

[241] Arguments 53, 54.

[242] UNHRC 'General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [34]; *Zeljko Bodrožić v Serbia and Montenegro* Communication no 1180/2003 UN Doc A/61/40 (HRC, 31 October 2005) [7.2]; *Aduayom and Others v Togo* Communication nos 422/1990, 423/1990, 424/1990 UN Doc CCPR/C/51/D/422/1990, 423/1990, 424/1990 (HRC, 30 June 1994) [7.4.]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 144.

[243] *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992) [64]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [58]; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [61]; *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) [60]; *Ivcher-Bronstein v Peru* IACtHR Serie C No 74 (6 February 2001) [155]; *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003) [67]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [43]; *Kenneth Good v Botswana* Comm no 313/05 (ACommHPR, 2010) [198]; *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) [159]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [42]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 144.

[244] Clarifications 41.

[245] *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [51]; Tristan Donoso v Panama IACtHR Series C No 193 (27 January 2009) [121].

[246] Compromis 22, 31.

[247] *Prohibiting incitement to discrimination, hostility or violence – Policy Brief* (1st edn, Article 19, 2012) <https://www.refworld.org/docid/50bf56ee2.html> accessed 5 November 2019 31; *Animal Defenders*

they had no such intention, as their objective was to generate advertising revenue by boosting viewership.[248] Thus, the activation of the triangular relationship between the subject, object and audience of the speech act required to establish intention was lacking.[249]

76. When aiming to assess intention on the basis of the content, it must be taken into account that speeches and actions may conceal intentions different from the ones it seems to proclaim.[250] It is also significant that A and B made no statements or commit actions shown in the broadcast, merely assisted in their dissemination.[251]

d) Content and form

77. Even ideas that offend, shock or disturb are protected as free speech.[252] The prosecution argued that the maintenance of the channel created a hostile and demeaning environment.[253] However, the fact that democratic discourse disturbed some people cannot justify Surya's

International v the United Kingdom App no 48876/08 (ECtHR, 22 April 2013) concurring opinion of Judge Bratza [7], [18]; *Annen v Germany* App no 3779/11 (ECtHR, 18 October 2018) [24]; *Editorial Board of Grivna Newspaper v Ukraine* App nos 41214/08 and 49440/08 (ECtHR, 16 April 2019) [94]; *Gürbüz and Bayar v Turkey* App no 8860/13 (ECtHR, 23 July 2019) dissenting opinion of Judge Pavli [13].

248 Compromis 29.

249 UNHRC, 'Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred' (11 January 2013) UN Doc A/HRC/22/17/Add 4 [29] (Rabat Plan of Action).

250 *United Communist Party of Turkey and Others v Turkey* App no 19392/92 (ECtHR, 30 January 1998) [58]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [51].

251 *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [31].

252 *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) [42]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) [32] *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) joint dissent opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) partly dissenting opinion of Judge Palm; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [58]; *Freedom and Democracy Party (ÖZDEP) v Turkey* App no 23885/94 (ECtHR, 8 December 1999) [37]; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) [87]; *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) [101].

253 Compromis 31.

interference.[254] Moreover, the SuryaFirst channel campaigned for a new law for months,[255] thus the videos of 16 February cannot be understood in isolation.[256] Examining the whole activity of the channel, it was an expression of an intransigent attitude towards contemporary institutions and cannot be construed as hate speech. [257]

78. Consequently, neither Hiya!'s users nor fAIth! interpreted the message as hate speech,[258] thus they were not blocked by Hiya!.[259]

e) Extent

79. As stated in Issue C,[260] SuryaFirst broadcast channel had minimal following, thus limited reach.[261]

f) Likelihood

80. As stated in Issue C,[262] there was no clear and present danger.[263]

81. Considering the above factors, the interference did not respond to a pressing social need.

[254] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), art 10; *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49], [50].

[255] Compromis 13.

[256] *Ibragim Ibragimov and Others v Russia* App nos 1413/08, 28621/11 (ECtHR, 28 August 2018) [99], [116].

[257] *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [48].

[258] Compromis 18, Clarifications 37.

[259] Compromis 18.

[260] Arguments 59, 60.

[261] Compromis 13.

[262] Arguments 61-63

[263] *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) concurring opinion of Judge Bonello; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) partly dissenting opinion of Judge Bonello; *Whitney v California* Concurring opinion of Mr Justice Brandeis 247 US 357, 377 (1927).

(iv) The interference was not proportionate

82. Section 300(2) sets out a maximum of 10-year imprisonment or a fine of no more than USD 3,000 for advocacy of hatred.[264] A and B was ordered to pay a fine of USD 2,000 each.[265] The fine was disproportionate in relation to international practice.[266] Among the variety of post-expression interferences with FoE, [267] criminal conviction is the most dangerous.[268] What matters is not only the severity of the Applicants' sentence but the very fact that they were criminally convicted.[269]

83. Even a relatively moderate fine cannot negate that effect,[270] because it was capable of discouraging A and B from making critical statements in the future.[271] The decisive factor when assessing the consequences is the manner in which they could be held liable for third-party content.[272] In other words, not merely USD 2,000 is at stake,[273] rather the entire course of action, sanctioning them for only operating a broadcast channel on Hiya!.[274] Holding A

[264] Compromis 22.

[265] Compromis 26.

[266] 'PF v Mark Meechan' *(Judiciary of Scotland)* <http://www.scotland-judiciary.org.uk/8/1962/PF-v-Mark-Meechan?fbclid=IwAR08Jnc6iAxQ-enkeOwTe7U1hfIMiR2ijIM3vEWd8PifBmg0P_kj-mPX3IU> accessed 5 November 2019; EBH/25/2016.

[267] *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) [57].

[268] Monica Macovei *A guide to the implementation of Article 10 of the European Convention on Human Rights* (Human Rights Handbook No 2, Council of Europe, 2004) 26.

[269] *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [273].

[270] *Dupuis and Others v France* App no 1914/02 (ECtHR, 7 June 2007) [48].

[271] *Lombardo and Others v Malta* App no 7333/06 (ECtHR, 24 April 2007) [61].

[272] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt.v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [86].

[273] Compromis 26.

[274] Compromis 31.

and B liable will incite similar entities to self-censor and to err on the side of caution[275] , therefore, cause a chilling effect.[276]

[275] *Internet Intermediaries: Dilemma of Liability* (1st edn, Article 19, 2013) <https://www.article19.org/resources/internet-intermediaries-dilemma-liability/> accessed 5 November 2019 11.

[276] *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010) [102]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt.v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [86]; UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' UN Doc A/HRC/17/27 (16 May 2011) [28].

IX. PRAYER FOR RELIEF

In the light of arguments advanced and authorities cited, the Applicants respectfully request this Honourable Court to adjudge and declare that:

1. Surya's decision to obtain personal data from Hiya! and from certain other users violated X's rights under Article 17 of the ICCPR.
2. Surya's decision to obtain personal data regarding A and B from Hiya! violated their rights under Article 17 of the ICCPR.
3. Surya's prosecution and conviction of X violated his rights under Article 19 of the ICCPR.
4. Surya's prosecution and conviction of A and B violated their rights under Article 19 of the ICCPR.

On behalf of A and B and X

302A

Agents for Applicants

Memorial for Respondent

2019/2020

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302R

THE 2019-2020 MONROE E. PRICE

INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

A, B and X

(*Applicants*)

v.

Surya

(*Respondent*)

MEMORIAL FOR RESPONDENT

Word Count for Argument Section: 4,999

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II. LIST OF ABBREVIATIONS

ACHPR	**African Charter on Human and Peoples' Rights**
ACHR	**American Convention on Human Rights**
ACommHPR	**African Commission on Human and Peoples' Rights**
Appellate Court	**Appellate Court of Surya**
High Court	**Criminal High Court of Sun City**
CJEU	**Court of Justice of the European Union**
Clarifications	**Price Media Law Moot Court Competition 2019-20 Compiled Clarification Questions and Answers**
CoE	**Council of Europe**
Compromis	**The 2019/2020 Price Media Law Moot Court Competition Case**
Constitution	**Surya's Constitution**

ECHR	**European Convention on Human Rights**
ECtHR	**European Court of Human Rights**
EU	**European Union**
fAIth!	**An upload filter called 'first Artificially Intelligent test of hatred!'**
FoE	**Freedom of Expression**
FoR	**Freedom of Religion**
Honourable Court	**Chamber of the Universal Court of Human Rights, Universal Freedom of Expression Court**
IACtHR	**Inter-American Court of Human Rights**
ICCPR	**International Covenant on Civil and Political Rights**
MoA	**Margin of Appreciation**
PhoNo	**Mobile Phone Number**

No(s)	**Number(s)**
OSCE	**Organisation for Security and Co-operation in Europe**
PD	**Personal Data**
SCPA	**Surya's Criminal Procedure Act**
UDHR	**Universal Declaration of Human Rights**
UN	**United Nations**
UN Doc	**United Nations Document**
UNGA	**United Nations General Assembly**
UNHRC	**United Nations Human Rights Committee**
USD	**United States' Dollar**

III. LIST OF AUTHORITIES

MATERIALS FROM THE INTERNET

Susan Benesch, ’Dangerous Speech: A Proposal To Tackle Violence’ (Voices That Poison: Dangerous Speech Project, 2011) <https://dangerousspeech.org/wp-content/uploads/2018/01/Dangerous-Speech-Guidelines-2013.pdf> accessed 5 November 2019 ..... 54, 56

Toby Mendel, ‘Restricting Freedom of Expression: Standards and Principles’ (Centre for Law and Democracy, 2010) <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> accessed 7 November 2018 ..... 47, 60

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UNHRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ UN Doc A/HRC/23/40 (17 April 2013)..... 36

UNHRC, ‘Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ (11 January 2013) UN Doc A/HRC/22/17/Add 4 ..... 52, 62

UNHRC, ‘General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations

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IV. STATEMENT OF RELEVANT FACTS

Surya

The country of Surya has a population of approximately 25 million people. 90% of the population identify themselves as Suryan, which has both ethnic and religious connotations. A majority of the Suryans are followers of the 'Suryan' faith. 8-10% of the population are economic migrants from neighbouring countries.[1]

Chandra is an island approximately 200 miles from the coast of Surya. For decades it has been plagued by an ethno-religious civil war waged by the adherents of the majority Chandrean religion against the Tarakans, a belief minority. As a result, many families were forced to flee to Surya on makeshift boats to seek asylum. The laws of Surya permit registered asylum seekers to obtain employment and to access social services.[2]

Hiya!

Hiya! is an online messaging application, which is used by over 75% of the entire population of Surya. It can be used on mobile phones and other devices. Hiya! can be downloaded free of charge. A user can register simply by using their mobile phone number.[3]

The application has two basic functions. Using the 'bilateral chat' function, a user can correspond with any other user on a one-to-one basis. A user can send a message to any other user whose mobile phone number they are familiar with. Users can share photographs, audio and video files, and links with each other via bilateral chats. The 'broadcast' function enables users to stream audio or video content to other users. The word 'live' appears on real-time streams, while pre-recorded broadcasts display the words 'pre-recorded'. Any user can

[1] Compromis 1.

[2] Comromis 2.

[3] Compromis 3.

subscribe to another user's broadcast channel by searching for and clicking on the 'subscribe' button of a channel. Many organisations use this function to broadcast their messages.[4]

Every broadcast channel has a 'unique link', which a subscriber can share with other users via the bilateral chat. In possession of the link, any user can view the broadcast, even without subscribing to the channel.[5]

A broadcaster can alert their subscribers that a broadcast is about to begin or has begun by using the 'ping' function of the app. A user is informed of the broadcast by a 'star' appearing over the broadcast tab. A broadcaster can also communicate with any of their subscribers via the bilateral chat. They also have the option of sending a mass message to all their subscribers.[6]

A broadcast can be downloaded as a separate audio-visual file by any user, and it can also be re-shared. This option is available for 30 seconds after a broadcast ends, however, the broadcaster has the possibility not to make their broadcast downloadable by selecting the 'protected' icon prior to launching.[7]

Hiya! developed an upload filter, called 'first Artificially Intelligent test of hatred!' (fAIth!), which automatically screens the broadcasts and blocks them – even in live feeds – if they contain content considered to be 'hate speech' by the definition of Hiya!'s 'Standards on Hate Speech'. The fAIth! could detect 87% of 'hate speech' correctly only if trained properly.[8]

Campaign against *andha*

Andha is a Tarakan philosophy which considers sight as the principal means of temptation and believes that *andha* followers must turn a blind eye to temptation. Wearing a blindfold

[4] Compromis 4-6.

[5] Compromis 7.

[6] Compromis 8.

[7] Compromis 9, 18.

[8] Compromis 9.

represents this, however, only a handful of Tarakans adopted this practice in public, and even then, they solely wear it in the context of public meditation and during processions.[9]

Some ethnic Suryans have also adopted the *andha* philosophy. However, only around 2% of Suryans claimed to be adherents of *andha*.[10]

In January 2019 Suryan nationalist groups launched a campaign demanding that the government introduce laws to protect the original Suryan faith and the Sun by banning any blasphemy in connection with them and by preventing proselytism and conversion of Suryans into *andha*. One prominent group, with high standing in the Suryan society, called 'SuryaFirst', which the Applicants are members of, claimed in the campaign that Tarakans were corrupting the social fabric in Surya as they were 'insular' and possessed an 'irrational' culture. They especially denounced the wearing of blindfolds.[11]

The SuryaFirst group maintained a broadcast channel on Hiya!, called Seeing is Believing. It had over 100,000 subscribers in Surya. The group started a series of broadcasts in the campaign advocating for a new law and urged subscribers to press the government to enact such a law.[12]

On 20 January 2019, the government announced that it was holding public consultations during the next week on a new law to regulate proselytism and 'forced conversion'. On 15 February the Penal Act was amended with Section 220, which forbids the forced conversion from one faith to another.[13]

At 4pm on 16 February, the SuryaFirst channel pinged its subscribers and sent out a link to all of them, alerting them that an important broadcast on the situation of Surya was about to begin

[9] Compromis 10.

[10] Compromis 11.

[11] Compromis 10.

[12] Compromis 13.

[13] Compromis 12, 14.

at 4.15pm. By that time, approximately 30,000 subscribers and 5,000 other users were tuned in.[14]

The broadcast began with a message of a masked individual, referring to himself as the Sun Prince. He made a speech regarding the alleged danger the *andha* followers mean to Suryan society. He called upon the viewers to 'strip them of their blindfolds' and threatened *andha* followers with the 'wrath of the Sun'. After that, a live video began which depicted a group of masked individuals harassing a male person on a well-known street in Sun City, Surya's capital. The person, wearing a blindfold, was on his way to an *andha* meditation when the group shouted at him, demanding that he remove the blindfold. Some also began to chant 'seeing is believing'. After 3 minutes of public humiliation in front of the building that hosted the meditation, the group leader walked over to the person and tore off the blindfold. The broadcast ended with Sun Prince urging the viewers to immediately take action.[15]

The broadcast was downloaded by around 3,000 users, who then shared it with other users. Within 24 hours only, over 250,000 users, more than 7 times the original viewers, had seen the video, and sharing continued over the next few days.[16]

Between 18 and 28 February more than a hundred similar videos were broadcasted on Hiya!. One such video, which has been shared and saved as well, depicted a group committing violence against a blindfolded person. In another video, a group of men shone a flashlight into the face of a young, visually impaired woman. On 28 February a video was broadcast on the SuryaFirst channel in which the Sun Prince thanked his faithful followers for taking action.[17]

Complaints and investigations

[14] Compromis 15.

[15] Compromis 17, 21.

[16] Compromis 19.

[17] Compromis 19.

On 1 March 2019 two complaints were filed. The first complainant, S was the person depicted in the 16 February broadcast. He complained that the broadcast had humiliated him and had subjected him to hostility and exclusion from his ethnic community, as he was an ethnic Suryan. He only put on a blindfold before taking part in a meditation, when the masked group attacked him. S submitted his complaint under Section 220 of the Penal Act, claiming that the incident was an attempt to forcibly convert him from his faith. T submitted another complaint under Section 300 of the Penal Act, which forbids the advocacy of hatred. She explained, that as a Tarakan and a person with visual impairments, she had suffered from a 'hostile and demeaning' environment, created by the rhetoric and propaganda of the SuryaFirst group. The discrimination that had been affecting her throughout her life had increased since February. She had experienced verbal insults in public, therefore rather minimised her public travel. She also furnished an affidavit from a witness who claimed that on one occasion a group of persons had shone flashlights at her face when she had been travelling in public with the aid of a guide dog.[18]

The prosecutor's office launched an investigation into both complaints. It sought assistance from Hiya!, which indicated that it would cooperate and would share the personal data of certain users if a formal request was sent. The prosecutor's office then sent a formal letter to which Hiya! replied with the mobile phone numbers of the broadcasters of the SuryaFirst channel. After that, the relevant mobile service providers were instructed by a judicial warrant to disclose the names pertaining to the mobile phone numbers, thus A and B were tracked down.[19]

A and B were then interrogated, where and they revealed that Sun Prince in the broadcast was in fact X. There was no coercion, and a lawyer was also present during the interrogation.[20]

[18] Compromis 23.

[19] Compromis 24; Clarifications 60.

[20] Compromis 25.

Criminal proceedings

On 1 May 2019, the prosecutor's office indicted X under Section 220 of the Penal Act and A and B under Section 300 of the Penal Act. The Criminal High Court of Sun City convicted X to two years imprisonment but suspended the sentence for two years. It also convicted A and B and directed them to pay a fine of USD 2,000.[21]

According to Surya's Criminal Procedure Act, any convicted can challenge the conviction. A, B and X appealed to the Appellate Court of Surya, as they claimed that the conviction violated their rights to privacy and freedom of expression, guaranteed respectively in Article 8 and 10 in the Suryan Constitution.[22]

The prosecutor of the case argued that X's actions were an attempt to forcibly convert other persons by the use of force, through threats, and people actually faced social excommunication and pressure as a result. She then argued that the broadcast channel, maintained by A and B created a hostile and demeaning environment for *andha* followers and people with visual impairments, which resulted in hostility and violence towards them. She also indicated that they shared links to their broadcasts, which constituted advocacy. Regarding privacy, the prosecutor argued that Hiya! as a private enterprise chose to cooperate on its own volition, thus there was no need for obtaining a judicial warrant. She also contended that A and B voluntarily revealed the identity of X, who had no right to remain anonymous in the context of a criminal offence.[23]

The Appellate Court correctly decided to uphold the convictions of A, B and X and confirmed their sentences.[24]

[21] Compromis 26.

[22] Compromis 27, 28.

[23] Compromis 31, 32.

[24] Compromis 33.

V. STATEMENT OF JURISDICTION

Surya (Respondent) has approached the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights, hearing issues relating to the alleged violation of rights recognised in the Article 17 and Article 19 of the ICCPR.

A, B and X appealed the legal decisions of the Criminal High Court of Sun City to the Appellate Court of Surya, but it legally decided to uphold the convictions of A, B and X and confirmed the sentences issued by the High Court. A, B and X exhausted their domestic appeals.

This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

The Respondent requests this Honourable Court to issue a judgment in accordance with relevant international law, including the UDHR, the ICCPR, Conventions, jurisprudence developed by relevant courts, and principles of international law.

VI. QUESTIONS PRESENTED

The questions presented, as certified by this Honourable Court, are as follows:

1. Whether Surya's decision to obtain personal data from Hiya! and from certain other users violated X's rights under Article 17 of the ICCPR.
2. Whether Surya's decision to obtain personal data regarding A and B from Hiya! violated their rights under Article 17 of the ICCPR.
3. Whether Surya's prosecution and conviction of X violated his rights under Article 19 of the ICCPR.
4. Whether Surya's prosecution and conviction of A and B violated their rights under Article 19 of the ICCPR.

VII. SUMMARY OF ARGUMENTS

Surya's decision to obtain personal data from Hiya! and from certain other users did not violate X's rights under Article 17 of the ICCPR

Surya's decision to obtain personal data from Hiya! and A and B did not interfere with X's privacy for two reasons. Firstly, Hiya! did not disclose his identity, and secondly, X's identification concerned personal data, which is not a part of privacy, but a separately protected fundamental right. Furthermore, none of Surya's contested measures were capable of identifying X, a combination of multiple lawful steps was required. Most importantly, X as a Suryan religious leader did not have a legitimate expectation of privacy, since as a suspect of a grave offence, his expectation of privacy was not legitimate.

As an alternative, if the Honourable Court adjudges that the measures after all concerned the right to privacy, Respondent submits, that the interference was neither unlawful nor arbitrary.

Firstly, the interference was envisaged by law, as the Surya's Criminal Procedure Act both regulates evidence gathering and law enforcement authorities obtaining personal data from Hiya!. Moreover, Section 220 serves as the basis for the actions in domestic law, which was published, thus accessible, and is worded with sufficient clarity for X to reasonably foresee that his conduct would lead to criminal proceedings where his identification would be deemed necessary. Finally, the Suryan legal system provides adequate safeguards against arbitrariness: the interrogation was surrounded with adequate safeguards, and an appellate procedure was conducted to revise the first-degree judgement.

Secondly, the interference pursued legitimate aims. The mission to prevent disorder or crime and protect the public's and the victims' interest, combined with Surya's positive obligation to ensure effective remedy by identifying the actual perpetrator justify the restriction of X's privacy.

Thirdly, the interference was reasonable in the particular circumstances, since it did not go further than to meet the pressing social need to prosecute the perpetrator behind the atrocities against the *andha* community. Correspondingly, Surya's decision was proportionate, since online anonymity cannot be a barrier for providing practical and effective protection to the actual victims.

Surya's decision to obtain personal data regarding A and B from Hiya! did not violate their rights under Article 17 of the ICCPR

Surya's decision to obtain personal data from Hiya! did not interfere with A and B's privacy. Even though the required mobile phone numbers constitute personal data, they are not a part of privacy but a separately protected fundamental right. Furthermore, the mobile phone numbers did not allow for the direct identification of A and B, further actions were needed to track down the broadcasters. Most importantly, A and B waived their reasonable expectation of privacy when voluntarily registering on Hiya! with their respective mobile phone numbers.

Alternatively, if the Honourable Court adjudges, that the measures after all concerned the right to privacy, Respondent submits, that the interference was neither unlawful nor arbitrary.

Firstly, the contested measure was envisaged by law, since the Surya's Criminal Procedure Act served as a domestic legal ground for such request and it was accessible. Likewise, the provision was formulated with sufficient precision to enable A and B to foresee the consequences of their advocacy, and the emergency situation taking over Suryan society was enough reason for intervention without delay even without obtaining a judicial warrant.

Secondly, the request of personal data pursued legitimate aims to protect the public order, and the rights of others, namely, the rights of the *andha* believers and the victims of the atrocities. A and B's broadcasts proliferated on Hiya! with the actual occurrence of arousing hatred, distrust, and discrimination against the vulnerable members of Surya's population.

Thirdly, their identification was necessary in a democratic society for the following reasons. Surya faced an enormous challenge containing the situation from January to May 2019. In order to fulfil its positive obligation and protect public order, it was obliged to grant appropriate special powers for investigating authorities to identify the people behind the hatred-advocating broadcast channel. Even though Surya obtained A and B's mobile phone numbers without judicial authorization, its conduct was legal as it obtained a judicial warrant when the suspects became directly identifiable by the mobile service operators. Therefore, the measure can by no means be held disproportionate.

Surya's prosecution and conviction of X did not violate Article 19 of the ICCPR

Surya's prosecution and conviction of X did not violate his freedom of expression. Firstly, the prosecution was prescribed by law, because Section 220 had been published by 16 February, thus it was adequately accessible for X. Moreover, Section 220 cannot be regarded as insufficiently precise, since, to be able to keep pace with changing circumstances, criminal law provisions on proselytism cannot be formulated with absolute precision.

Secondly, the prosecution pursued the legitimate aims to protect the public order and the rights and reputation of others, namely the religious minority of *andha* adherents, having regard to the fact that X's attempt of forced conversion created immense pressure to change their faith.

Thirdly, the prosecution was necessary in a democratic society for the following reasons. X's remarks were directed against the religious identity of *andha* adherents, thus they were liable for offending intimate personal convictions within the sphere of religion, which is a sphere where States enjoy a wide margin of appreciation. Additionally, Surya is under a positive obligation to ensure the peaceful co-existence of religions. It must also be taken into account that at the time of broadcast, Surya experienced increased tension in connection with *andha*, thus X's speech was likely to exacerbate an already explosive situation. Moreover, X acted as

a mouthpiece of the influential nationalist group SuryaFirst, therefore his threats were more likely to be acted upon. Furthermore, the speech contained explicit and immediate calls for violence, in an audio-visual form to boot, which has the most powerful effect amongst all mediums. The danger was even more acute as the expressions were broadcast through Hiya!, where they were disseminated rapidly and widely, and persistently remained online. Considering all these factors, the prosecution responded to a pressing social need. Nevertheless, the term of the prison sentence, which was even suspended, is remarkably lower than the statutory maximum, thus can by no means deemed disproportionate.

Surya's prosecution and conviction of A and B did not violate Article 19 of the ICCPR

Surya's prosecution and conviction of A and B did not violate their freedom of expression. Firstly, the prosecution was prescribed by law, because it was undisputedly foreseeable that sending hyperlinks to content online that incites hatred constitutes advocacy of hatred under Section 300 of the Penal Act.

Secondly, the prosecution pursued legitimate aims to protect the public order and the rights and reputation of others, namely the religious minority of *andha* adherents, having regard to the fact that the incitement of A and B resulted in actual violence and hostility against them.

Thirdly, the prosecution was necessary in a democratic society for the following reasons. The broadcast was directed against the religious identity of *andha* adherents, thus it was liable for offending intimate personal convictions within the sphere of religion, which is a sphere where States enjoy a wide margin of appreciation. Additionally, at the time of the broadcast, Surya experienced increased tension in connection with *andha*, thus the incitement through the operation of a broadcast channel that distorts a highly inflammable topic had to be regarded as likely to exacerbate an already explosive situation. Moreover, the videos were broadcast on the channel of the influential nationalist group SuryaFirst, therefore the incitement was more likely

to be acted upon. Furthermore, the opening part of the broadcast contained explicit calls for violence, while the live stream provided a demonstration of how such violence could be committed, all in audio-visual form, which has the most powerful effect among mediums. The danger was even more acute as the expressions were broadcast through Hiya!, where they were proliferated rapidly and widely with generous help from A and B, and persistently remained online. In addition, a State is allowed to intervene even before actual violence occurs. Considering all these factors, the prosecution responded to a pressing social need. Nevertheless, the amount of the fines, which are remarkably lower than the statutory maximum, can by no means be deemed disproportionate.

VIII. ARGUMENTS

ISSUE A: SURYA'S DECISION TO OBTAIN PERSONAL DATA FROM HIYA! AND CERTAIN OTHER USERS DID NOT VIOLATE X'S RIGHTS UNDER ARTICLE 17 OF THE ICCPR

1. Privacy is a broad term[25] not susceptible to exhaustive definition.[26] Private life protects the integrity of a person,[27] therefore the question arises whether privacy comprehends the protection of PD as well.
2. The legality of Surya's decisions to obtain PD from Hiya! and certain other users involves a two-stage test:[28] (A) whether such decision interfered with X' privacy under Art.17; and if yes, (B) whether such interference was unlawful and arbitrary.

A) Surya's decisions did not interfere with X's privacy

3. To establish whether Surya's decision interfered with the Applicant's privacy under Art.17, Respondent proceeds according to the test set up by the ECtHR in *Benedik v Slovenia*: (i)

[25] *Peck v the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003) [57]; *S. and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [66]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [129]; *Vukota-Bojić v Switzerland* App no 61838/10 (ECtHR, 18 October 2016) [52].

[26] *Bensaid v the United Kingdom* App no 44599/98 (ECtHR, 6 February 2001) [47]; *Antović and Mirković v Montenegro* App no 70838/13 (ECtHR, 28 November 2017) [41]; Dennis F. Hernandez, 'Litigating the Right to Privacy: A Survey of Current Issues' (1996) 446 PLL/PAT 425, 429; DeVRIES, 'Protecting Privacy in the Digital Age' (2003) 18 Berkeley Technology Law Journal 284.

[27] *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985) [22]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [41].

[28] UNHRC 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [4]; Ursula Kilkelly, *The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention of Human Rights* (Human Rights Handbook No 1, Council of Europe, 2003) 8-9.

nature of the interest involved, (ii) whether the Applicant was identified by the contested measure and (iii) whether the Applicant had a reasonable expectation of privacy.[29]

(i) Nature of the interest

4. Concerning Surya's decisions[30], the decision to obtain PD from Hiya! and acquiring PD from certain other users must be distinguished:[31]

5. As the request in relation to Hiya! was unsuccessful, the police interrogation of A and B was necessary to reveal X's identity. It is indisputable, that the identification of X during the interrogation concerned PD.[32] However, for instance, the EU explicitly affords the 'right to the protection of PD' besides to the right to privacy under Article 7,[33] consequently, distinguishing PD protection as a distinct fundamental right.[34]

[29] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [107]-[118]; *Katz v United States* 389 US 347, 361 (1967).

[30] Compromis 37.

[31] Compromis 24, 25.

[32] Compromis 25; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) [65]; *Sidabras and Džiautas v. Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004) [43]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [133]; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [70]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [40], [46], [53], [102], [107]; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted January 1981, entered into force 10 January 1985) 1496 UNTS 66 art 2; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 art 4.1; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 art 2a).

[33] Charter of Fundamental Rights of the European Union [2000] OJ C364/01 art 7, art 8; Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317 paras 69, 74, 81, 97, 99.

[34] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 Preamble (1); Daphne Keller, 'The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation' (2018) 3 Berkley Technology Law Journal 305.

(ii) Whether X was identified by the contested measure

6. The prosecutor's office only sought assistance from Hiya! and did not ask for any specific data regarding X. Moreover, the decision was made only after the examination of S and T's complaints and the establishment of a reasonable suspicion that Sun Prince committed a crime.[35]
7. The request of PD was unsuccessful,[36] therefore this conduct did not lead to the identification of X.
8. Afterwards, only the lawful[37] interrogation of the broadcasters revealed the identity of X,[38] prior to which the broadcasters had to be identified.[39]
9. Consequently, neither of the contested measures could identify X separately, a combination of methods was required to reveal his identity.

(iii) X did not have a reasonable expectation of privacy

10. X appeared as the religious leader[40] in the broadcast, which appeared in public[41], as around 3000 Hiya! users downloaded and saved the broadcast containing X's message.[42] The proliferation was contagious: over 250.000 users watched it and it was later shared with more users.[43]

[35] Compromis 24.

[36] Compromis 24.

[37] Compromis 25.

[38] Compromis 25.

[39] Compromis 24-25.

[40] Arguments 67.

[41] Compromis 15-16.

[42] Compromis 18.

[43] Compromis 19.

11. X had no reasonable expectation of privacy as his speech was broadcasted in a public space, where others were able to percept it as he communicated his message on the Internet.[44] The message humiliated and threatened vulnerable groups, and individuals[45], therefore in this situation X's privacy interest was overridden by the public interest. [46] In view of a grave offence, the Applicant's expectation of privacy is reduced.[47]
12. Furthermore, anonymity over the internet should be put into a wider perspective. It is not absolute and must yield on occasion to other legitimate interests.[48] In this situation, it would be unreasonable for X to expect to remain anonymous under a criminal investigation.[49]
13. Therefore, X's interest in having his identity protected is not legitimate[50] thus, Art.17 is not applicable.

B) The interference was not unlawful and arbitrary

14. If the Honourable Court accepts that the issue affects privacy, the interference should be examined from two aspects: whether it was unlawful and arbitrary, which is also subject to

[44] 15B Am Jur 2d Computers and the Internet [28].

[45] Compromis 16, 19, 21.

[46] Elizabeth Pollman, 'A Corporate Right to Privacy' (2014) 99 Minnesota Law Review 27, 58.; *Whalen v Roe* 429 US 589, 599 (1977).

[47] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [46]; *Expelled Dominicans and Haitians v Dominican Republic* IACtHR Series C No 282 (28 August 2014) [427]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [99].

[48] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49]; *Right to Online Anonymity – Policy Brief* (1st edn, Article 19, 2005) <https://www.article19.org/resources/report-the-right-to-online-anonymity/> accessed 3 November 2019 10.

[49] *Expelled Dominicans and Haitians v Dominican Republic* IACtHR Series C No 282 (28 August 2014) [427].

[50] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49].

a three-part inquiry: whether the interference (i) was envisaged by law; (ii) pursued legitimate aims; and (iii) was reasonable in the particular circumstances.[51]

(i) The interference was envisaged by law

15. The concept of envisaged by law requires interference to have a legal basis, to be accessible and foreseeable to the individuals and there must be adequate and effective safeguards.[52]
16. The SCPA serves as a domestic legal ground for criminal investigation,[53] which was accessible to the Applicant, as it was published.[54]
17. A law must be formulated precisely enough to enable citizens to regulate their conduct accordingly and foresee the consequences of their actions. However, absolute precision cannot be achieved as legislation has to keep up with changing circumstances.[55]
18. Although Section 220(1) entered into force one day before the broadcast,[56] it only requires refrainment.[57] Hence, X should have expected that his conduct would lead to criminal

[51] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 12(3), art 18(3), art 21, art 22(2); UNHRC 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3], [4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [8.3]; *Antonius Cornelis Van Hulst v the Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.3]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5]; UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' UN Doc A/HRC/23/40 (17 April 2013) [28]-[29].

[52] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; UNHRC 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3].

[53] Clarifications 3, 7; *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [47].

[54] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [87]; Compromis 27.

[55] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [35]; *Usón Ramírez v Venezuela* IACtHR Series C No 207 (20 November 2009) [55].

[56] Compromis 14, 15.

[57] Compromis 14;

proceedings. Besides, SCPA entitles the authorities to obtain PD.[58] Therefore, he could have foreseen that his privacy would be affected.

19. The identity of X was revealed by A and B during the interrogation, which was appropriately conducted.[59]
20. As the law was accessible, foreseeable, and the interrogation was appropriately conducted with adequate safeguards, Surya's decision was envisaged by law.

(ii) The interference pursued legitimate aims

21. The prosecution's decisions to obtain PD pursued legitimate aims, namely the prevention of disorder or crime,[60] and the protection of the public's and the victims' interests by persecuting criminal offenders and allowing the actual offender to be identified and brought to court.[61]
22. Moreover, the rights of others[62] must be mentioned since the advocacy violated the FoR of *andha* believers and people living with disabilities.[63] Furthermore, Surya has a positive obligation to ensure S and T's privacy by identifying the actual perpetrator.[64]

[58] Clarifications 7.

[59] Compromis 25.

[60] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [46]; *S. and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [100]; *Segerstedt-Wiberg and Others v Sweden* App no 62332/00 (ECtHR, 6 June 2006) [87]; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [77]; *M.K. v France* App no 19522/09 (ECtHR 18 April 2013) [32]; *Roman Zakharov v Russi*a App no 47143/06 (ECtHR, 4 December 2015) [237]; *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [39].

[61] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [47].

[62] *Saint-Paul Luxembourg S.A. v Luxembourg* App no 26419/10 (ECtHR, 18 April 2013) [42], [57]; *Ricardo Canese v Paraguay* IACtHR Series C No 111 (31 August 2004) [72].

[63] Compromis 21-23.

[64] *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979) [32]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [42].

(iii) The interference was reasonable in the particular circumstances

23. The requirement of reasonableness is interpreted as an interference with privacy which is a)necessary in the circumstances of the given case and b)proportionate to the end sought.[65]

a) The interference was necessary

24. In order to determine whether a particular infringement upon Art.17 is 'necessary in a democratic society', the interests of Surya should be balanced against the rights of the Applicant.[66]
25. It is for the national authorities to make the initial assessment of the pressing social need; accordingly, a MoA is left to them.[67]
26. The interference is reasonable if it does not go further than what is necessary to meet the pressing social need.[68] Only the practical effectiveness of criminal investigations provide the necessary level of protection when the moral wellbeing of a vulnerable group is at stake.[69] The confidentiality of PD would have prevented Surya from conducting an effective investigation.

[65] UNHRC 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3]-[4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [6.4], [8.3]; *Antonius Cornelis Van Hulst v the Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.6]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5], [7.4].

[66] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (Council of Europe/European Court of Human Rights, 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdd> accessed 1 November 2019 [19]

[67] *Płoski v Poland* App no 26761/95 (ECtHR, 12 November 2002) [35]; *Bagiński v Poland* App no 37444/97 (ECtHR, 11 October 2005) [89]; *Piechowicz v Poland* App no 20071/07 (ECtHR, 17 April 2012) [212].

[68] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [48], [49]; *Tristán Donoso v Panama* IACtHR Series C No 193 (27 January 2009) [56].

[69] *August v the United Kingdom* App no 36505/02 (ECtHR; 21 January 2003); *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) [150]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [46].

27. There was a pressing social need to prosecute X as from the beginning of 2019 there has been a social and religious upheaval in Surya regarding Tarakan asylum seekers and *andha* philosophy, as some Suryans saw them as a threat to their faith.[70] A campaign was started to protect Suryan faith and prevent conversion to *andha***.**[71] This culminated in the events between 16-28 February when the first recorded atrocities happened in the SuryaFirst channel's broadcast on 16 February, which was followed by more than a hundred of similar videos.[72] Not only have these broadcasts affected the life of the *andha* followers, but they also created a hostile and demeaning environment towards people with disabilities.[73]
28. Furthermore, Surya provided appropriate circumstances during the interrogation: a lawyer was present, there were no complaints, and A and B revealed X's identity on their own volition. [74]

b) The interference was proportionate

29. Although online anonymity is an important factor in protecting FoE and privacy,[75] it shall not result in the states' failure to protect the rights of potential victims, particularly vulnerable persons'.[76]

[70] Compromis 10, 19.

[71] Compromis 10.

[72] Compromis 17, 19.

[73] Compromis 23.

[74] Compromis 25.

[75] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [117]; *Right to Online Anonymity – Policy Brief* (1st edn, Article 19, 2005) <https://www.article19.org/resources/report-the-right-to-online-anonymity/> accessed 3 November 2019 1.

[76] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49]. See also *Right to Online Anonymity – Policy Brief* (1st edn, Article 19, 2005) <https://www.article19.org/resources/report-the-right-to-online-anonymity/> accessed 3 November 2019 13.

30. The implementation of practical and effective protection requires effective steps to identify and prosecute the perpetrator.[77] The overprotection of anonymity may prevent the perpetrator from being identified, and thus posing a barrier to effective investigations.[78]
31. X's statements had discriminatory effects and caused harm on vulnerable people, such as individuals with disabilities and *andha* believers; and their fundamental rights were at stake.[79] Therefore, there were no other less intrusive measures for Surya to fulfil its obligation to provide remedy for the victims and enabling the authorities to identify the offender.[80]
32. As all measures were conducted lawfully and in accordance with the purpose and objective of the ICCPR, Art.17 was not violated.

ISSUE B: SURYA'S DECISION TO OBTAIN PERSONAL DATA FROM HIYA! DID NOT VIOLATE A AND B'S RIGHTS UNDER ARTICLE 17 OF THE ICCPR

33. The examination of the legality of Surya's decision to obtain PD from Hiya! involves the two-stage test introduced earlier.[81]

[77] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49].

[78] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [147]; Steve Wood, 'Data Protection law does not prevent information sharing to save lives and stop crime' (Information Commissioner's Office 'Blog, 12 April 2019) <https://ico.org.uk/about-the-ico/news-and-events/blog-data-protection-law-does-not-prevent-information-sharing-to-save-lives-and-stop-crime/> accessed 3 November 2019.

[79] Compromis 16, 19, 21; *M.C. v Bulgaria* App no *39272/98* (ECtHR, 4 December 2003) [150]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [43].

[80] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [47].

[81] Arguments 2.

A) Surya's decisions did not interfere with A and B's privacy

34. To establish whether Surya's decision interfered with their privacy, Respondent proceeds according to the test set up by the ECtHR in *Benedik v Slovenia*.[82]

(i) Nature of the interest

35. The prosecutor's office only sought assistance from Hiya!.[83] The required PD concerning the account are PhoNos[84] of its users, and since over 75% of the population used Hiya![85] it was common knowledge, that it only controlled PhoNos.[86] Therefore, Surya's decision was only directed at the PhoNos of the broadcasters.

36. The PhoNos are undisputedly PD,[87] however, they only indirectly identify an individual.[88] Additionally, as it was stated above,[89] the protection of PD is a distinct fundamental right.[90]

[82] Arguments 3; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [107]-[118].

[83] Compromis 24.

[84] Compromis 24.

[85] Compromis 3.

[86] Compromis 3.

[87] *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) [65]; *Sidabras and Džiautas v Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004) [43]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [133]; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [70]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [40], [46], [53], [102], [111]; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted January 1981, entered into force 10 January 1985) 1496 UNTS 66 art 2; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 art 4.1; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 art 2a).

[88] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [51].

[89] Arguments 5.

[90] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 Preamble (1); Daphne Keller, 'The

(ii) Whether A and B were identified by the contested measure

37. The prosecutor's office decided to seek assistance only after it examined S and T's complaints and established a reasonable suspicion that the broadcasters were involved in a crime.[91]

38. Surya's decision to obtain PD only resulted in the disclosure of their PhoNos, and no further data.[92] The PhoNos were only used as a stepping-stone to identify the mobile phone service used by Hiya!'s users.[93] To directly establish the identity[94] of A and B a judicial warrant was obtained.[95]

(iii) A and B did not have a reasonable expectation of privacy

39. In order to determine whether the notion of privacy is applicable to the present case, it remains to be examined whether, in view of the publicly accessible nature of Hiya!, the Applicants had a reasonable expectation that their privacy would be respected and protected. A and B had participated in the application voluntarily, to which access had not been restricted.[96] They knowingly exposed their online activity and associated their PhoNos

Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation' (2018) 3 Berkeley Technology Law Journal 305.

[91] Compromis 24.

[92] Compromis 24.

[93] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [26]; Council of Europe *Handbook on European data protection law – 2018 edition* (European Union Agency for Fundamental Rights and Council of Europe, 2018) 92.

[94] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [26]; Council of Europe *Handbook on European data protection law – 2018 edition* (European Union Agency for Fundamental Rights and Council of Europe, 2018) 92.

[95] Clarifications 60.

[96] Compromis 3.

to the application at the time of registration.[97] Pursuant to the third-party doctrine, they waived their legitimate expectation of privacy with the registration.[98]

40. For the above reasons, A and B's interest in having their anonymity protected in connection to their online activity is not legitimate.[99]

B) The interference was not unlawful and arbitrary

41. Even if the Honourable Court accepts that Surya's decision constituted an interference with privacy, Respondent follows the three-part test described in Issue A.[100]

(i) The interference was envisaged by law

42. The concept of envisaged by law requires interference to fulfil the criteria hereinbefore provided.[101]

43. The SCPA serves as a domestic legal ground,[102] which was accessible to the Applicants.[103] Laws must be formulated precisely enough to enable citizens to regulate their conduct accordingly and foresee the consequences of their actions. However, absolute precision

[97] Compromis 3.

[98] *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [115]; *Smith v Maryland* 442 US 735, 743-744 (1979); Orin S Kerr, 'The Case for the Third-Party Doctrine' 107 Michigan Law Review 561.

[99] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49].

[100] Arguments 3.

[101] Arguments 15-18.

[102] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [47]; *Dudgeon v the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981) [44]; *Chappell v the United Kingdom* App no 10461/83 (ECtHR, 30 March 1989) [52]; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [28].

[103] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [87].

cannot be achieved as legislation has to keep up with the changing circumstances and it would cause unreasonable strictness in the application of the law.[104]

44. Although the SCPA requires a judicial warrant,[105] there was no need to instruct Hiya! to cooperate as it chose to cooperate on its own volition.[106] Furthermore, in this case, an emergency situation in the Suryan society[107] had to be resolved with an intervention without delay. The concept of 'urgency' gives citizens sufficient indication of the conditions in which the public authorities are entitled to resort to interference without prior judicial authorization.[108]

45. Any person convicted of an offence may challenge the conviction on the basis that it violated one of their rights guaranteed under the Constitution before the Appellate Court.[109] This provides an effective judicial review of the executive authority's action,[110] as the right to appeal is considered in itself to be an adequate safeguard.[111]

46. Taking into account that this right was granted to the Applicants, Surya provided safeguards against unfettered discretion.

[104] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [28]; *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [35]; *McLeod v the United Kingdom* App no 24755/94 (ECtHR, 23 September 1998) [41]; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) [34]; *Kazakov v Russia* App no 1758/02 (ECtHR, 18 December 2008) [22].

[105] Clarifications 7.

[106] Compromis 24, 32.

[107] Compromis 19.

[108] *Heino v Finland* App no 59/1997/843/1049 (ECtHR, 15 February 2011) [42]; *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [36].

[109] Compromis 27.

[110] *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [37].

[111] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [72]; *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [37]; *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (HRC, 26 October 2000) [11.1].

(ii) The interference pursued legitimate aims

47. The prosecution's decisions to obtain PD pursued legitimate aims, namely the prevention of disorder or crime,[112] and the protection of the public's and the victims' interests.[113]

(iii) The interference was reasonable in the particular circumstances

48. The requirement of reasonableness is interpreted as an interference with privacy shall be a)necessary in the circumstances of the given case and b)proportionate to the end sought.[114]

a) The interference was necessary

49. In accordance with the necessity principle[115] specified above,[116] States are afforded a wide MoA to determine what constitutes a pressing social need and how to properly respond to it.[117]

[112] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [46]; *Segerstedt-Wiberg and Others v Sweden* App no 62332/00 (ECtHR, 6 June 2006) [87]; *S. and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [100]; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [77]; *M.K. v France* App no 19522/09 (ECtHR 18 April 2013) [32]; *Roman Zakharov v Russi*a App no 47143/06 (ECtHR, 4 December 2015) [237]; *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [39].

[113] Arguments 21-22.

[114] UNHRC 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) [3]-[4]; *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [6.4], [8.3]; *Antonius Cornelis Van Hulst v the Netherlands* Communication No 903/2000, UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) [7.6]; *G v Australia* Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5], [7.4].

[115] *Ürper and Others v Turkey* App nos 14526/07, 14747/07, 15022/07, 16737/07, 36137/07, 47245/07, 50371/07, 50372/07, 54637/07 (ECtHR, 20 January 2010) [43].

[116] Arguments 24.

[117] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [48]; *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) [55]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39].

50. The nature of the States' obligation depends on the particular aspects of private life that is at stake.[118] Furthermore, the choice of means in principle falls within the State's MoA.[119]
51. The balance between the various rights and freedoms depends on the context. The weight given to the various rights is different in each situation.[120] As anonymity is not an absolute right, it must yield on occasion to other legitimate interests.[121]
52. States have an obligation to ensure that investigative authorities possess appropriate special powers in investigating computer-related crimes to identify a private person who violated another individual's private life.[122] The rule of prior judicial authorization[123] enshrined in the SCPA[124] in exceptional cases can be overridden in emergency situations.[125]
53. Even though Surya obtained A and B's PD, its conduct was legal as it obtained a judicial warrant when the suspects became directly identifiable by the mobile service operators.[126]

[118] *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985) [24]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [43].

[119] *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985) [24]; *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) [150]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [43].

[120] *De Wilde, Ooms and Versyp v Belgium* App nos 2832/66, 2835/66, 2899/66 (ECtHR, 18 June 1971) [93]; *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) [45]; *Engel and Others v the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) [100]; *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [48]; *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [49] *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) [59].

[121] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [149]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49]; *Right to Online Anonymity – Policy Brief* (1st edn, Article 19, 2005) <https://www.article19.org/resources/report-the-right-to-online-anonymity/> accessed 3 November 2019 13.

[122] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008*)* [42].

[123] *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [34]; *Dumitru Popescu v Romania* App no 71525/01 (ECtHR, 26 April 2007) [70]-[73]; *Iordachi and Others v Moldova*, App no 25198/02 (ECtHR, 10 February 2009) [40].

[124] Clarifications 7.

[125] *Heino v Finland* App no 59/1997/843/1049 (ECtHR, 15 February 2011) [42]; *Trabajo Rueda v Spain* App no 32600/12 (ECtHR, 30 May 2017) [35].

[126] Clarifications 60.

b) The interference was proportionate

54. Anonymity over the internet should be put into a wider and more critical perspective.[127] The decision to obtain PD was the least intrusive measure,[128] as Surya sought assistance from the police accompanied by a judicial warrant to contact the mobile service operator to track down the names of the broadcasters instead of intercepting the content on Hiya!.[129]

55. Considering all the above, the measure taken by Surya was necessary in the circumstances of the present case and proportionate to the legitimate aims sought. Without the intervention, Surya would not have complied with its positive obligation to provide the victims with practical and effective protection by preventing the authorities from identifying and prosecuting the perpetrators[130] advocating hatred on their broadcast channel.[131]

ISSUE C: SURYA'S DECISION TO PROSECUTE AND CONVICT X DID NOT VIOLATE HIS RIGHTS UNDER ARTICLE 19 OF THE ICCPR

56. It is generally acknowledged that FoE is a fundamental right. [132] It is a lynchpin of democracy,[133] key to the protection of all human rights and one of the basic conditions for

[127] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [149].

[128] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [26].

[129] Clarifications 60.

[130] *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) [150]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [46].

[131] Compromis 16, 17.

[132] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) art 19; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2).

[133] Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles' (Centre for Law and Democracy, 2010) <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> accessed 7 November 2018 1.

their progress and for the development of every man.[134] Nevertheless, it is recognised that these rights are not absolute, hence they can be restricted to ensure the exercise of other human rights.[135] States can take measures to restrict FoE when such limitations are prescribed by law, pursue a legitimate aim, and are necessary and proportionate.[136]

57. Surya submitted a declaration upon ratification the ICCPR,[137] which should indeed be construed as a declaration.[138] Alternatively, assuming that the declaration amounts to a reservation, it is still permissible, as it is compatible with the object and purpose of the ICCPR.[139] Surya's reservation is not general,[140] it refers only to Art.19 (2)-(3),[141] indicating

[134] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [41]; *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991) [57]; *Association Ekin v France* App no 39288/98 (ECtHR, 17 July 2001) [56]; *Perna v Italy* App no 48898/99 (ECtHR, 6 May 2003) [39].

[135] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(3); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 13.

[136] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Francisco Martorell v Chile* IACtHR Informe No 11/96 (3 May 1996) [55]; *Herrera-Ulloa v Costa Rica* IACtHR Series C No 107 (2 July 2004) [120].

[137] Compromis 35.

[138] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 2(1)(d); *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988) [48]; UNHRC, 'General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [3]; Report of the International Law Commission UN Doc A/66/10/Add 1, 74.

[139] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(3); Mark E Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL 2009) 325; UNHRC, 'General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [6], [7].

[140] UNHRC, 'General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [19].

[141] Compromis 35.

its scope in precise terms.[142] Additionally, it does not deny the essence of the right,[143] as the Constitution offers protection for FoE.[144]

(i) The interference was prescribed by law

58. The prosecution and conviction of X were prescribed by law as it was foreseeable,[145] accessible and provided legal protection against arbitrary interferences.[146]

59. Laws should give citizens adequate indications of legal rules applicable to the given case.[147] A basis for interference was to be found in the amended Penal Act which was published,[148] therefore it served as a legal basis:[149] Section 220 came into effect on 15 February and was published a day before X's broadcasted message.[150] Moreover, the amendment was

[142] UNHRC, 'General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev 1/Add 6 [19].

[143] *Restrictions to the Death Penalty Arts. 4(2) And 4(4) American Convention on Human Rights*, Advisory Opinion OC 3-83, IACtHR Series A No 3 (8 September 1983) [61].

[144] Compromis 28.

[145] *Goodwin v the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) [31]; *Tammer v Estonia* App no 41205/98 (ECtHR, 6 February 2001) [37]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [43]; UNHRC, 'General Comment 34: Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25].

[146] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [90]; *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) [34]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [59]; UNHRC, 'General Comment 34: Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25].

[147] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; Steven Greer *The exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing 1997) 10; UNHRC, 'General Comment 34: Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25].

[148] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [87].

[149] Compromis 14.

[150] Compromis 14, 16.

preceded by public consultation,[151] which made the amendment foreseeable. Consequently, the accessibility of the law does not raise any concern.[152]

60. A norm can be regarded as 'law' if it is formulated with sufficient precision to enable citizens to regulate their conduct.[153] Foreseeability does not require absolute certainty,[154] consequences may still be sufficiently foreseeable if the person concerned has to take legal advice.[155] Section 220(2) uses expressions such as 'divine displeasure, and 'social excommunication' that are neither vague nor overbroad. The need to avoid excessive rigidity and to keep pace with changing circumstances means many laws are inevitably couched in terms which are vague.[156] Criminal law provisions on proselytism fall within this category.[157] Moreover, similar terms are used in other acts as well.[158] Therefore, it would be impossible to define 'force' more precisely.

61. A law must indicate the scope of any discretion of the authorities to give individuals adequate protection against arbitrary interference. Section 220 allowed X to appeal the

[151] Compromis 12.

[152] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [87], [93].

[153] *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [88]; *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67], [68]; *Weber and Saravia v Germany* App no 54934/00 (ECtHR, 29 June 2006) [93], [94]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) [51]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57].

[154] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [35].

[155] *Tolstoy Miloslausky v the United Kingdom* App no 18139/91 (ECtHR, 13 July 1995) [37]; *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [35]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [44], [45]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [129].

[156] *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40].

[157] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40].

[158] Ss 2 (b), 7, 25, 349, 366A, 415, The Indian Penal Code, 1960.

conviction before the Appellate Court, which is an adequate safeguard.[159] Taking into account that such right was granted to X, Suryan law contained adequate safeguards against unfettered discretion.

(ii) The interference pursued legitimate aims

62. The legitimate aims pursued were the protection of the rights and reputations of others and the protection of public order[160]. The term 'others' may refer to individuals or a community defined by religious faith or ethnicity.[161] Here, Surya's intervention pursued the protection of vulnerable minorities and the pluralism indissociable from a democratic society.[162] It served the protection of *andha* followers in their rights to not be insulted in their religious identity[163] as X's attempt of forced conversion created immense pressure to change their

[159] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [72]; *Gürtekin and Others v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014) [20]; *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (HRC, 26 October 2000) [11.4].

[160] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(3).

[161] UNHRC, 'General Comment 34: Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [28].

[162] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [31]; *Buscarini and Others v San Marino* App no 24645/94 (ECtHR, 18 February 1999) [34]; *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [49]; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [60]; *Refah Partisi (the Welfare Party) and Others v Turkey* App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) [90]; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [104]; *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) [118]; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [124]; *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016) [103].

[163] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [47]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [48]; *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003) [67]; *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 September 2005) [25]; *Aydın Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006) [24]; *Klein v Slovakia* App no 72208/01 (ECtHR, 31 October 2006) [45]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [44].

faith.[164] Therefore, state authorities as guarantors of public order can adopt measures even of criminal-law nature to protect public order.[165]

(iii) The interference was necessary

63. X was convicted for the attempt of forced conversion.166 The 'threat of divine displeasure' and 'social excommunication' amounted to 'force'.[167] The threat was produced through speech, therefore X's remarks should be assessed in light of standards applying to hate speech. To demonstrate that the conviction was necessary in a democratic society, arguments will be structured according to the six-part test provided by the Rabat Plan of Action.[168]

a) Context

64. Although X's speech[169] might have pertained to public concern,[170] it should not enjoy protection. 'Public discourse is based on non-coercive debate aimed at reaching

[164] Compromis 21, 31

[165] *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) [59]; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) [46]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [54]; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [61].

[166] Compromis 14, 21, 26, 31.

[167] Compromis 14, 31.

[168] UNHRC, 'Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred' (11 January 2013) UN Doc A/HRC/22/17/Add 4 [29] (Rabat Plan of Action).

[169] Compromis 16.

[170] *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992) [64]; *Amnesty International v Zambia* Comm no 212/98 (ACommHPR, 1999) [46]; *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) [60]; *Ivcher-Bronstein v Peru* IACtHR Series C No 74 (6 February 2001) [155]; *Kenneth Good v Republic of Botswana* Comm no 313/05 (ACommHPR, 2010) [198].

understanding.'[171] In contrast, the impugned remarks[172] had no such aims, but incited hatred thus did not contribute to free public discourse.[173] Such general and vehement attacks are often excluded from protection.[174]

65. When regulating FoE in relation to matter liable to offend intimate personal convictions within the sphere of morals or religion, a wide MoA is afforded to the States.[175] Surya therefore legitimately considered it necessary to take measures to repress the imparting of X's speech that was directed against *andha* followers[176] and which was incompatible with FoR.[177] Moreover, Surya has a positive obligation to ensure peaceful co-existence of all religions,[178] meanwhile providing fair treatment to the minorities.[179] Due to their turbulent

[171] Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 123.

[172] Compromis 16.

[173] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [49]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [37]; *Giniewski v France* App no 64016/00 (ECtHR, 31 January 2006) [43]; *Ibragim Ibragimov and Others v Russia* App nos 1413/08 and 28621/11 (ECtHR, 28 August 2018) [92]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 123, 127.

[174] *Pavel Ivanov v Russia* App no 35222/04 (ECtHR, 20 February 2007) [1]; *Norwood v the United Kingdom* App no 23131/03 (ECtHR, 16 November 2004); *J.R.T. and the W.G. Party v Canada* Communication No 104/1981 UN Doc CCPR/C/OP/2 (UNHRC, 18 July 1981) [8].

[175] *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [35]; *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [50]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [58]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [37]; *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 September 2005) [25]; *Aydın Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006) [24]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [50].

[176] Compromis 16.

[177] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [48]; *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [47]; *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 September 2005) [26].

[178] *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [107]; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [126]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [44].

[179] *Young, James and Webster v the United Kingdom* App nos 7601/76 and 7806/77 (ECtHR, 13 August 1981) [63]; *Folgerø and Others v Norway* App no 15472/02 (ECtHR, 29 June 2007) [84]; *Erçep v Turkey* App no 43965/04 (ECtHR, 22 November 2011) [62]; *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016) [109].

history,[180] Tarakans have become a particularly vulnerable group, who require special protection.[181]

66. In the months leading up to X's actions, the tension regarding *andha* was increasing.[182] In these circumstances, X's speech had to be regarded as likely to exacerbate an already explosive situation.[183]

b) Speaker

67. X exercised special influence over his audience, as he appeared to be a divine authority as Sun Prince.[184] He also appeared as a speaker of a prominent nationalist group with high social status,[185] even influencing government and legislation.[186] These factors rendered his speech more dangerous.[187] His audience already followed the nationalist SuryaFirst channel,[188] thus they were more likely to react to the incitement than the general public.[189]

[180] Compromis 2.

[181] *D.H. and Others v the Czech Republic* App no 57325/00 (ECtHR, 13 November 2007) [182]; *Aksu v Turkey* App nos 4149/04 and 41029/04 (ECtHR, 15 March 2012) [44].

[182] Compromis 10, 13.

[183] *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) [60]; *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) [45]; *Gül and Others v Turkey* App no 4870/02 (ECtHR, 8 June 2010) dissenting opinion of Judges Sajó and Tsotsoria.

[184] Compromis 16.

[185] Compromis 10.

[186] Compromis 13, 14.

[187] *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) [49], [60]; *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (HRC, 26 October 2000) [11.6]; Susan Benesch, 'Dangerous Speech: A Proposal To Tackle Violence' (Voices That Poison: Dangerous Speech Project, 2011) <https://dangerousspeech.org/wp-content/uploads/2018/01/Dangerous-Speech-Guidelines-2013.pdf> accessed 5 November 2019 3.

[188] Compromis 13.

[189] *Prohibiting incitement to discrimination, hostility or violence – Policy Brief* (1st edn, Article 19, 2012) <https://www.refworld.org/docid/50bf56ee2.html> accessed 5 November 2019 31.

c) Intent

68. X purposefully propagated radical ideas and views[190] and was convicted for attempting to forcibly convert persons from one faith to another,[191] which presupposes intention. X not meant to merely criticise *andha* for its regressive-isolative nature,[192] but sought to mobilize believers to convert people from *andha* to Suryan with direct provocation: the speech was composed of virulent religious and social threats calling for immediate action.[193] X communicated 'true threats',[194] which encompassed statements intending to prompt others to commit unlawful violence to a particular group.[195] Additionally, X thanked his faithful followers' actions in a broadcast on 28 February,[196] thus acknowledging the consequences of his speech.

d) Content and form

69. X's speech rose to the level of hate speech, amounting to conversion by the use of force,[197] punishable under Section 220.[198] Although X used metaphors conveying his ideas, his

[190] *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [62]; *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) [43].

[191] Compromis 14, 21, 31.

[192] Compromis 29.

[193] Compromis 16, 17.

[194] *Watts v United States*, 394 US 705, 708 (1969).

[195] *Virginia v Black*, 538 US 343, 344 (2003).

[196] Compromis 19.

[197] *A Narrowing Space: Violence and discrimination against India's religious minorities* (Center for Study of Society and Secularism & Minority Rights Group International, 2017) <https://minorityrights.org/publications/narrowing-space-violence-discrimination-indias-religious-minorities/> accessed 5 November 2019 3

[198] Compromis 14.

audience clearly understood his call for violence and reacted accordingly,[199] thus this meaning must be analysed.[200] He attached derogatory meaning to the characteristics of *andha* and called its followers 'sightless' and 'unlawful'.[201] He also asserted that Suryans face danger from *andha*,[202] stirring up emotions and hardening already embedded prejudices which have manifested in violence.[203] The phrase 'wrath of the Sun'[204] should be understood as a call for physical violence, and he used the imperative to communicate incitement ('strip them', 'force them').[205] This exercised an unlawful pressure on *andha* followers to abandon their faith,[206] thus attacked the foundation of a democratic society, pluralism and FoR.[207]

[199] Compromis 19.

[200] Susan Benesch, 'Dangerous Speech: A Proposal To Tackle Violence' (Voices That Poison: Dangerous Speech Project, 2011) <https://dangerousspeech.org/wp-content/uploads/2018/01/Dangerous-Speech-Guidelines-2013.pdf> accessed 5 November 2019 4

[201] Compromis 16.

[202] Compromis 16.

[203] *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [62].

[204] Compromis 16.

[205] Compromis 16.

[206] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [48].

[207] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [31]; *Buscarini and Others v San Marino* App no 24645/94 (ECtHR, 18 February 1999) [34]; *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [49]; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [60]; *Refah Partisi (the Welfare Party) and Others v Turkey* App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) [90]; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [104]; *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) [118]; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [124]; *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECtHR, 26 April 2016) [103].

70. The message was conveyed in a video, which has the most powerful effect among the mediums.[208] It featured a masked individual,[209] which heightened the appeal of violence and conveyed a fearful message.

71. The speech was transmitted through a dedicated anti-*andha* broadcast channel,[210] not counterbalanced by opposing arguments[211] and effectively reached its target audience who reacted violently.[212]

e) Extent

72. Clearly unlawful speech, including hate speech, can be disseminated worldwide like never before, in a matter of seconds, and remain persistently available online.[213] The broadcast was published on Hiya![214] a popular application in Surya,[215] which facilitated proliferation.[216] Mainstream platforms have more extensive reach compared to those having minimal followers.[217] Since Hiya! has an enormous user base in Surya,[218] the broadcasts could easily reach the majority of citizens in a blink of an eye. The speed of dissemination

[208] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [31]; *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003) [74]; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013) [119].

[209] Compromis 16.

[210] Compromis 13.

[211] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [31]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [44].

[212] Compromis 16, 19.

[213] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [110].

[214] Compromis 13, 15.

[215] Compromis 3.

[216] Compromis 15, 19.

[217] *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 28 August 2018) [79].

[218] Compromis 3.

was startling: 35,000 people were tuned in by 4.15pm on 16 February.[219] The 'downloadable' setting of the broadcast also accelerated the dissemination:[220] within 24 hours it reached more than 250,000 people.[221]

73. Moreover, the broadcast channel pinged its subscribers before the broadcast,[222] and also sent the link via a mass message,[223] so that it can spread from subscribers to non-subscribed users, which caused the broadcast to proliferate on both tabs of the app.[224] The popularity of the platform, the downloadable setting and the notification system far supersede the potential of traditional media.[225]

f) Likelihood

74. Incitement to hatred is an inchoate crime, thus the speech does not have to be followed by action to amount to incitement.[226] Moreover, inciting hatred does not necessarily entail a call for an act of violence or other criminal acts.[227] Insulting or slandering specific groups of the population is sufficient for authorities to combat the speech concerned.[228]

[219] Compromis 15.

[220] Compromis 18.

[221] Compromis 19.

[222] Compromis 15.

[223] Compromis 15.

[224] Compromis 15, 18.

[225] *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) [63].

[226] *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) [43]; *Prohibiting incitement to discrimination, hostility or violence – Policy Brief* (1st edn, Article 19, 2012) <https://www.refworld.org/docid/50bf56ee2.html> accessed 5 November 2019 39.

[227] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) [73]; *Vejdeland and Others v Sweden* App no 1813/07 (ECtHR, 9 February 2012) [55].

[228] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) [73]; *Vejdeland and Others v Sweden* App no 1813/07 (ECtHR, 9 February 2012) [55].

Furthermore, a State cannot be required to wait until actual violence occurs before taking action,[229] potential violence should suffice.[230] Thus, the prosecution of X would have been necessary even if it had not had any actual consequences.

75. However, X's speech was followed by acts of violence and hostility.[231] Since the rights of individuals were violated, Surya had a positive obligation to prosecute the speech.[232]

76. Considering the above factors, the interference responded to a pressing social need.

(iv) The interference was proportionate

77. Section 220(4) sets out a maximum combination of 5 years imprisonment and a USD 1,500 fine.[233] However, X was only sentenced to suspended 2 years imprisonment.[234] Considering that X's conviction was part of the authorities' efforts to combat the situation resulting from his statements,[235] the measures taken were within the authorities' MoA. In relation to the vital interests of Surya,[236] the fact that X faced the possibility of a prison sentence did not have a chilling effect.[237] X committed 'the most severe and deeply felt form of opprobrium'[238] which should be sanctioned under criminal law. Respondent acknowledges

[229] *Vona v Hungary* App no 35943/10 (ECtHR, 9 July 2013) [57]; Antoine Buyse 'Dangerous expressions: The ECHR, Violence and Free Speech' 63 International & Comparative Law Quarterly 491.

[230] *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) [45].

[231] Compromis 19, 23.

[232] *Aksu v Turkey* App nos 4149/04 and 41029/04 (ECtHR, 15 March 2012) [44]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 236.

[233] Compromis 14.

[234] Compromis 26, 33.

[235] *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [51].

[236] *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [56].

[237] *Bingöl v Turkey* App no 36141/04 (ECtHR, 22 June 2010) [41]; *Yleisradio Oy and Others v Finland* App no 30881/09 (ECtHR, 8 February 2011).

[238] *R v Keegstra* [1990] 3 SCR 697, 697.

that criminal sanctions are "last resort measures.[239] However, the suspended imprisonment was imposed[240] as Surya's desperate attempt to stop the on-going violence within its borders,[241] and less severe measures would not have had an equally efficient effect.

ISSUE D: SURYA'S DECISION TO PROSECUTE AND CONVICT A AND B DID NOT VIOLATE THEIR RIGHTS UNDER ARTICLE 19 OF THE ICCPR

(i) The interference was prescribed by law

78. For a restriction to be provided by law, a legal act must be sufficiently precise[242] as to the rule's exemptions, limitations, and penalties,[243] to enable people to regulate their conduct accordingly.[244] Section 300 prohibits advocacy of hatred, defines what constitutes advocacy and sets out possible penalties in an unambiguous manner.[245] Consequences may still be sufficiently foreseeable if the person concerned has to take appropriate legal advice.[246] In

[239] *Report on the Relationship Between Freedom of Expression and Freedom of Religion* (Venice Commission, 17-18 October 2008) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)026-e> accessed 4 November 2019 [55].

[240] Compromis 26.

[241] Compromis 10, 12, 13, 16, 19-23.

[242] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) [48]; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40].

[243] *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]; Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles' (Centre for Law and Democracy, 2010) <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> accessed 7 November 2018 7.

[244] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Hashman and Harrup v the United Kingdom* App no 25594/94 (ECtHR, 25 November 1999), [31]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [121].

[245] Compromis 22.

[246] *Tolstoy Miloslausky v the United Kingdom* App no 18139/91 (ECtHR, 13 July 1995) [37]; *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [35]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [44]-[45]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [129].

addition, persons carrying on professional activity are expected to take special care in assessing the legal risks that their activity entails.[247] A and B operated the channel as a commercial enterprise, so they 'should have been familiar with the legislation and case-law, and could also have sought legal advice.'[248]

79. Prohibiting advocacy of hatred is in line with international standards criminalising hate speech,[249] and legislations are similar around the world.[250] A and B cannot argue that the application of Section 300 for sharing videos and hyperlinking to content was not reasonably foreseeable. The application of criminal statutes to novel areas is permissible where it is 'consistent with the essence of the offence'.[251] There was no indication that Section 300 would only apply in cases where the hyperlink actually links to content and would not apply if it links to the broadcast channel only.[252] Consequently, it was foreseeable that the operation of a toxic channel could be a reason for liability for inciting hatred.

80. As stated in Issue C,[253] there were adequate safeguards available[254] to A and B.

[247] *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [45]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41].

[248] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [129].

[249] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 20(2); International Convention on the Elimination of All Racial Discrimination, (adopted 25 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 4; Council of Europe, 'Recommendation No R 97(20) of the Committee of Ministers to Member States on "hate speech" ' (30 November 1997) principle 1.

[250] *Brandenburg v Ohio*, 395 U.S. 444, 447 (1969); 10 mai 2007 Loi tendant à lutter contre certaines formes de discrimination (Belgian Anti-Discrimination Law), M.B. 30 mai 2007 p. 29016. art 21-26; Danish Penal Code (Straffeloven) section 266 B; Norwegian Penal Code, (Straffeloven) section 135 a; Constitution of Ireland Article 40.6.1° i.

[251] *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010) [185]; *Del Río Prada v Spain* App no 42750/09 (ECtHR, 21 October 2013) [93]; *Rohlena v the Czech Republic* App no 59552/08 (ECtHR, 27 January 2015) [50]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [134], [135].

[252] Compromis 22.

[253] Arguments 61.

[254] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [72]; *Gürtekin and Others v Cyprus* App nos 60441/13, 68206/13, 68667/13

(ii) The interference pursued legitimate aims

81. Following its obligation under Art.20 of the ICCPR[255] Surya criminalizes advocacy of hatred.[256] A and B provided an outlet for stirring up hatred.[257] The numerous religiously offensive and extremist videos led to the violation of the rights and reputations of others.[258] These violations of human rights also account to the violation of public order.[259] It certainly remains open to the competent authorities to adopt measures, even of criminal-law nature, to react appropriately.[260]

(iii) The interference was necessary

82. To demonstrate that the conviction was necessary in a democratic society, arguments will be structured according to the six-part test provided by the Rabat Plan of Action.[261]

(ECtHR, 11 March 2014) [20]; *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (HRC, 26 October 2000) [11.4].

255 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 20.

256 Compromis 22.

257 *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [63].

258 Compromis 19, 23.

259 UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 [22].

260 *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) [46]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [54]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [54]; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [61].

261 UNHRC, 'Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred' (11 January 2013) UN Doc A/HRC/22/17/Add 4 [29] (Rabat Plan of Action) [29].

a) Context

83. As stated in Issue C,[262] the impugned broadcasts[263] incited hatred, thus did not contribute to free public discourse.[264]

b) Speaker

84. A and B are operators of one of the most popular channels on Hiya!, with over 100,000 subscribers.[265] They exerted certain authority as members of the prominent group SuryaFirst.[266] They used their authority through their channel to provide outlet for stirring up violence and hatred.[267] They had full editorial control over the content, even the possibility to modify it after posting it.[268] Therefore, they were vicariously subject to the 'duties and responsibilities' of editorial and journalistic staff which assume even greater importance in situations of conflict and tension.[269]

[262] Arguments 64-66.

[263] Compromis 16.

[264] *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [49]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [37]; *Giniewski v France* App no 64016/00 (ECtHR, 31 January 2006) [43]; *Ibragim Ibragimov and Others v Russia* App nos 1413/08 and 28621/11 (ECtHR, 28 August 2018) [92]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 123, 127.

[265] Compromis 13.

[266] Compromis 10, Clarifications 41.

[267] *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [62].

[268] Clarifications 44.

[269] *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) [63]*; Sürek v. Turkey (no 3)* App no 24735/94 (ECtHR, 8 July 1999) [41]; *Saygılı and Falakaoğlu (no 2)* App no 38991/02 (ECtHR, 17 February 2009) [29].

c) Intent

85. A and B were convicted of advocacy of hatred on their channel.[270] Advocacy of hatred requires intent on the part of the originator of the expression.[271] A and B operated a toxic platform since January.[272] They deliberately disseminated broadcasts not only via pinging their subscribers, but simultaneously via mass messages as well to proliferate hatred extensively in exchange for revenue.[273] Furthermore, their intent is emphasized by not sending the settings of the broadcast to 'protected' to contain dissemination,[274] instead, they allowed subscribers to download and send it to non-subscribed users.[275] A and B did not project the content as part of a general debate, but merely shared one-sided hatred. [276]

d) Content and form

86. A and B managed the broadcast channel, the content of which was responsible for turning peaceful public discourse into an assault on society's most vulnerable groups, namely religious minorities and people with disabilities.[277] By producing and disseminating videos calling for hostility, discrimination and violence against minorities and 'live'

[270] Compromis 22, 31.

[271] *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013) concurring opinion of Judge Bratza [7], [18]; *Annen v Germany* App no 3779/11 (ECtHR, 18 October 2018) [24]; *Editorial Board of Grivna Newspaper v Ukraine* App nos 41214/08 and 49440/08 (ECtHR, 16 April 2019) [94]; *Gürbüz and Bayar v Turkey* App no 8860/13 (ECtHR, 23 July 2019) dissenting opinion of Judge Pavli [13]; *Prohibiting incitement to discrimination, hostility or violence – Policy Brief* (1st edn, Article 19, 2012) <https://www.refworld.org/docid/50bf56ee2.html> accessed 5 November 2019 31.

[272] Compromis 13.

[273] Compromis 29.

[274] Compromis 9, 18.

[275] Compromis 18.

[276] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [31]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [44].

[277] Compromis 13, 19, 20-23; Clarifications 41.

broadcasting[278] how such violence shall be committed without fear of repercussion, they set a provocative example.[279]

e) Extent

87. As stated in Issue C,[280] the popularity of the platform, downloadable setting and the notification system far superseded the potential of traditional media.[281]

f) Likelihood

88. As stated in Issue C,[282] the broadcasts were followed by actual violence,[283] therefore, Surya was under a positive obligation to prosecute the speech.[284]

89. Additionally, the live broadcast showed the group insulting an innocent and defenceless victim.[285] Where expression of ideas is accompanied by intimidating conduct, such as physical violence,[286] the protection granted to FoE is greatly reduced.[287]

90. Considering the above factors, the interference responded to a pressing social need.

[278] Compromis 17.

[279] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [33], [34]; *Ergin v Turkey (no 1)* App no 48944/99 (ECtHR, 16 June 2005) [34].

[280] Arguments 72-73.

[281] *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) [63].

[282] Arguments 74-76.

[283] Compromis 19, 23.

[284] *Aksu v Turkey* App nos 4149/04 and 41029/04 (ECtHR, 15 March 2012) [44]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015) 236.

[285] Compromis 17, 21.

[286] Compromis 17, 21.

[287] *Vona v Hungary* App no 35943/10 (ECtHR, 9 July 2013) [66]; Antoine Buyse 'Dangerous expressions: The ECHR, Violence and Free Speech' 63 International & Comparative Law Quarterly 491, 500.

(iv) The interference was proportionate

91. Section 300(2) sets out a combination of a 10-year imprisonment and a USD 3,000 fine maximum for advocacy of hatred.[288] A and B was sentenced to USD 2,000 each,[289] which is significantly lower than the statutory maximum.[290] The fine was proportionate also compared to practices of other countries.[291]

92. A and B operated the broadcast channel as a commercial enterprise,[292] thus financially benefitted from broadcasts posted on it. The commercial basis of operation is to be considered when assessing the proportionality of the fine.[293] Hence, by holding operators of a commercial enterprise liable for advocating hatred on numerous occasions - which not only caused disturbances in Surya, but also resulted in actual violence[294] – and ordering a fine of USD 2,000 per person[295] –, which is remarkably lower in comparison to the maximum penalty given in Section 300(2) - can by no means be considered disproportionate.

93. Although Applicants may submit that the fine could cause a 'chilling effect' on FoE, considering the small fine, instead of a lengthy imprisonment for advocating hatred, it is

[288] Compromis 22.

[289] Compromis 26, 33.

[290] Compromis 22.

[291] Greece Law 4285/2014 art 1.1; Luxembourg Criminal Code (1879) Article 457-1.

[292] Compromis 29.

[293] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [162].

[294] Compromis 19, 23.

[295] Compromis 26, 33.

rather of symbolic nature which is still capable of compelling such entities to act as 'diligent economic operators'[296] and to fulfilling their duties and responsibilities.[297]

[296] Case C-324/09 *L'Oréal SA v eBay* [2011] ECLI:EU:C:2011:474 [122].

[297] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [115].

IX. PRAYER FOR RELIEF

In the light of arguments advanced and authorities cited, Respondent respectfully requests this Honourable Court to adjudge and declare that:

1. Surya's decision to obtain personal data from Hiya! and from certain other users did not violate X's rights under Article 17 of the ICCPR.
2. Surya's decision to obtain personal data regarding A and B from Hiya! did not violate their rights under Article 17 of the ICCPR.
3. Surya's prosecution and conviction of X did not violate his rights under Article 19 of the ICCPR.
4. Surya's prosecution and conviction of A and B did not violate their rights under Article 19 of the ICCPR.

On behalf of Surya

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Agents for Respondent